DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 11-5721
Title: Corey A. Hill, Petitioner
v.
United States
Docketed: August 8, 2011
Lower Ct: United States Court of Appeals for the Seventh Circuit
Case Nos.: (10-3837)
Decision Date: April 7, 2011
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Jul 1 2011	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due September 7, 2011)
Aug 25 2011	Order extending time to file response to petition to and including October 7, 2011.
Oct 7 2011	Brief of respondent United States filed.
Oct 20 2011	DISTRIBUTED for Conference of November 4, 2011.
Oct 21 2011	Letter of October 21, 2011, received from counsel for the respondent. (Distributed)
Nov 8 2011	DISTRIBUTED for Conference of November 22, 2011.
Nov 10 2011	Reply of petitioner Corey A. Hill filed. (Distributed)
Nov 28 2011	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED The petition for a writ of certiorari in No. 11-5683, Dorsey v. United States, is granted. The cases are consolidated and a total of one hour is allotted for oral argument.
Nov 29 2011	Miguel A. Estrada, Esquire, of Washington D.C., is invited to brief and argue these cases, as amicus curiae, in support of the judgments below. VIDED.
Dec 2 2011	Motion to appoint counsel filed by petitioner Corey A. Hill.
Dec 21 2011	Motion DISTRIBUTED for Conference of January 13, 2012.
Jan 5 2012	The time to file the joint appendix and petitioners' briefs on the merits is extended to and including January 25, 2012. VIDED.
Jan 5 2012	The time to file the brief of the Court-appointed amicus curiae in support of the judgment below is extended to and including March 8, 2012. VIDED.
Jan 17 2012	Motion to appoint counsel filed by petitioner GRANTED. and Stephen E. Eberhardt, Esquire, of Tinley Park, Illinois, is appointed to serve as counsel for the petitioner in this case.
Jan 25 2012	Brief of respondent United States supporting petitioners filed. VIDED.
Jan 25 2012	Joint appendix filed. (Statement of costs filed)
Jan 25 2012	Brief of petitioner Corey A. Hill filed.
Jan 27 2012	Consent to the filing of amicus curiae briefs, in support of either party or of neither party,

	received from counsel for the petitioner.
Jan 30 2012	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED.
Feb 1 2012	Brief amici curiae of Former United States District Court Judges Paul G. Cassell and Nancy Gertner filed. VIDED.
Feb 1 2012	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed. VIDED.
Feb 1 2012	Brief amicus curiae of Center on the Administration of Criminal Law, New York University School of Law filed. VIDED.
Feb 3 2012	SET FOR ARGUMENT ON Tuesday, April 17, 2012.
Feb 10 2012	Motion for divided argument filed by petitioners. VIDED.
Feb 15 2012	Motion for divided argument filed by respondent United States. VIDED.
Feb 16 2012	Response of petitioners to motion of the Solicitor General for divided argument. VIDED.
Feb 17 2012	CIRCULATED.
Feb 17 2012	Record from U.S.D.C. for Northern District of Illinois is electronic.
Feb 17 2012	Record from U.S.C.A. for Seventh Circuit is electronic.
Feb 27 2012	Motion for divided argument DENIED. VIDED.
Feb 27 2012	Motion for divided argument filed by respondent GRANTED. VIDED.
Mar 8 2012	Brief amicus curiae of Court-appointed amicus curiae in support of the judgments below filed. VIDED. (Distributed)
Apr 9 2012	Reply of respondent United States filed. VIDED. (Distributed)
Apr 9 2012	Reply of petitioner Corey A. Hill filed. (Distributed)
Apr 17 2012	Argued. For petitioners: Stephen E. Eberhardt, Tinley Park, Ill. For respondent in support of petitioner: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D. C. For amicus curiae: Miguel A. Estrada, Washington, D.C. (Appointed by this Court.)
Jun 21 2012	Judgment VACATED and case REMANDED. Breyer, J., delivered the opinion of the Court, in which Kennedy, Ginsburg, Sotomayor, and Kagan, JJ., joined. Scalia, J., filed a dissenting opinion, in which Roberts, C. J., and Thomas and Alito, JJ., joined.
Jul 23 2012	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

No: 11-5721

FILED
JUL 0 2011
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

COREY HILL, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

COUNSEL OF RECORD:

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JUL 6 - 2011

⑥

QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in not sentencing the Defendant-Petitioner pursuant to the "Fair Sentencing Act of 2010" where Petitioner was sentenced on December 2, 2010 after the effective date of the FSA and the amendments to the Sentencing Guidelines mandated by the FSA?

TABLE OF CONTENTS

I. Jurisdiction.......... 1

II. Statement of the Case.......... 3

III. Reasons for Granting Certiorari.......... 7

IV. Conclusion.......... 18

Attached Appendix

A. April 7, 2011 Order of the Seventh Circuit Court of Appeals

B. December 9, 2010 Order of the District Court denying Motion to Reconsider sentence

C. Transcript of Sentencing proceedings in the District Court

D. Letter of Senators Durbin and Leahy

TABLE OF AUTHORITIES

CASES:

Bradley v. United States, 410 U.S. 605, 93 S.Ct. 1151 (1973) 10

Great Northern Ry. Co. v. United States, 208 U.S. 452, 28 S.Ct. 313 (1908) 12

Hamm v. City of Rock Hill, 379 U.S. 306, 85 S.Ct. 384 (1964) 11

Hertz v. Woodman, 218 U.S. 205, 30 S.Ct. 621 (1910) 12, 14

Lockhart v. United States, 546 U.S. 142, 126 S.Ct. 699 (2005) 13

Marrero v. Warden Lewisburg Penitentiary 417 U.S. 653, 94 S.Ct. 2532 (1974) ... 13

United States v. Bell, 624 F.3d 803 (7th Cir. 2010) 5

United States v. Douglas, ___ F/3d ___, 2011 U.S. App. LEXIS 10922 (1st Cir., May 31, 2011) 7

United States v. Fisher, ___ F.3d ___, 2011 U.S. App. LEXIS 10561 (7th Cir., May 25, 2011) 7

United States v. Rojas, ___ F.3d ___, 2011 U.S. App. LEXIS 12791 (11th Cir., June 24, 2011) 8

United States v. Schooner Peggy, 1 Cranch 103 (1801) 11

OTHER AUTHORITY:

Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 .... 8, 14

1 U.S.C. § 109 .... 12, 13

156 Cong.Red. H6199 (July 28, 2010).. 15

USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010).. 9, 15

18 U.S.C. §3553 (a)(4)(ii)... 16

I

JURISDICTION

The Seventh Circuit Court of Appeals issued an Order affirming the judgment of the District Court on April 7, 2011.

This petition is timely filed pursuant to Supreme Court Rule 13.3 in that it is being filed within ninety (90) days of the Circuit Court's final order.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

II

STATEMENT OF THE CASE

The prosecution was brought pursuant to 21 U.S.C. § 841(a). Jurisdiction in the District Court was pursuant to 18 U.S.C. §3231. The basis of jurisdiction in the Court of Appeals was conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Defendant-Petitioner Corey Hill was arrested on June 19, 2008, (Tr. 30), and indicted was on July 17, 2008. [Doc. 7]. Petitioner thereafter proceeded to trial and was found guilty by a jury on April 22, 2009 of delivery of over 50 grams of cocaine base. (Tr. 250-251).

The first witness called by the Government was Gregory Spayth, an Aurora police officer (Tr. 17), who was assigned as an ATF task force officer. (Tr. 18). On March 28, 2007, Spayth and ATF Special Agent Mark Anton met with an informant by the name of Craig Burns. (Tr. 18). Burns made arrangements to purchase crack cocaine from the Petitioner. (Tr. 21).

After Burns was provided with recording equipment (Tr. 22), Burns sat on his porch to await the arrival of the Petitioner. (Tr. 23). About an hour later, officers observed the Petitioner arrive at Burns' home. (Tr. 23). Burns and the Petitioner entered Burns' residence. (Tr. 25). A short time later, Petitioner was seen leaving the residence and driving away. (Tr. 27). Officers deactivated the recording equipment and Burns gave the officers a clear plastic baggie containing a rock-like substance. (Tr. 27).

Craig Burns, a self-admitted dope dealer (Tr. 73) who faced 20 years in jail (Tr. 74, 92), testified under a grant of immunity. (Tr. 68-69). He stated that in October of 2005 he was involved in the purchase of drugs from a government informant. (Tr. 37-38). Based upon this incident, he agreed to cooperate with the ATF. (Tr. 38).

Burns testified that he had known the Petitioner since the mid-1990's. (Tr. 39). On March 28, 2007, he set up a drug deal with the Petitioner. (Tr. 40). In an un-recorded phone call, he told the Petitioner he wanted to purchase two-and-a-half ounces of crack cocaine. (Tr. 41). Burns later denied saying he asked for crack and testified that he "just asked for two-and-a-half." (Tr. 80-81).

Agents outfitted Burns with a video camera (Tr. 42) and gave him $1,900. (Tr. 43). Burns was told to wait on his porch until the Petitioner arrived. (Tr. 43). When the Petitioner arrived at Burns' home, Petitioner had a fix-a-flat can in his hand. (Tr. 47). Burns and Petitioner went into the house into Burns' bedroom so the children would not see what was going on. (Tr. 48). The Petitioner told Burns to give him "13". (Tr. 49). Petitioner untwisted the bottom of the can and put two ounces of drugs on the bed. (Tr. 50). This was not on the video, though, as the recording did not show Petitioner's or Burns' hands. (Tr. 77). The net weight of the drugs was later determined to be 53.3 grams. (Tr. 126, 135-136).

Burns asked Petitioner why he only had two ounces and Petitioner said "that was all he had left, and he had that for his powder heads." (Tr. 50). Burns put the drugs in his dresser. (Tr. 51). A short time later, Petitioner left. (Tr. 52). Burns went out to the porch and called the officers. (Tr. 52). When they arrived, he gave the officers the drugs - that Burns described as crack- and the rest of the money. (Tr. 53).

The recordings made by Burns were played for the jury. When Burns said to Petitioner "man, you ain't have two-and-a-half cuz?" (Tr. 66), Petitioner responded, "hell no, that's all I had left and I had that in powder for my powder heads." (Tr. 67). Burns understood that to mean that Petitioner only had two ounces of powder, not crack cocaine left. (Tr. 67). Burns testified that Petitioner gave him two ounces of crack cocaine. (Tr. 68). The Court sustained the defense objection to Burns' surmising that Petitioner's delay in delivering the cocaine was because Petitioner had to cook the power into crack. (Tr. 96). The Court later overruled the defense objection to the Government's argument that the reason it took Petitioner almost an hour to get to Burns' house was because Petitioner had to cook the powder into crack. (Tr. 199-200).

ATF Agent Mark Anton was next to testify. (Tr. 104). Anton interviewed Petitioner on June 19, 2008. (Tr. 108). Petitioner acknowledged that it was Petitioner in the video involved in selling the crack cocaine to Burns (Tr. 117, 229) and that Petitioner "knew this was coming" as Burns had informed him that Burns had cooperated with law enforcement. (Tr. 117).

Lt. Robert Coleman of the Will County Sheriff's Police and a DEA task force agent (Tr. 148, 151), who had no involvement in this particular case (Tr. 156, 168), provided testimony about how the substance received from Petitioner was crack cocaine based on how "it appears to be at this point." (Tr. 163). Upon further examination, after he "smelled it" and "felt it", Coleman concluded the substance was crack cocaine. (Tr. 164, 168).

The jury found Petitioner guilty of distribution of 50 grams or more of crack cocaine. (Tr. 250-251).

The Appellant's sentencing was commenced on June 30, 2010 and completed on December 2, 2010. (Appendix C). The Court determined that it would use a 1-1 crack-to-powder cocaine ratio in determining the advisory Guideline range. (App. C; Tr. of December 2, 2010 at page 3). The Court determined the offense level to be 16 with a criminal history category of V resulting in an advisory Guideline sentence of 41-51 months. (App. C; Tr. of December 2, 2010 at pages 3-4).

The Government dismissed the 851 information. (App. C; Tr. of December 2, 2010 at page 4).

The question then became whether the provisions of the Fair Sentencing Act were applicable to Petitioner's sentencing thereby reducing the mandatory minimum sentence to five (5) from ten (10) years. (App. C; Tr. of December 2, 2010 at page 4-5). Relying on the Seventh Circuit's decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), the District Court found that the Fair Sentencing Act did not retroactively apply to Petitioner. (App. C; Tr. of December 2, 2010 at page 8). But for the mandatory minimum of ten (10) years, the Court would have sentenced Petitioner "at the high end of the guideline range of 51 months." (App C; Tr. of December 2, 2010 at page 14).

The Petitioner was thereafter sentenced to 120 months imprisonment on December 2, 2010. Defendant's Motion to Reconsider his sentence was denied on December 9, 2010. (Attached App. B; Doc. 106). Notice of Appeal was timely filed on December 10, 2010.

The Seventh Circuit Court of Appeals affirmed the judgment of the District Court on April 7, 2011. (Appendix A).

III

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The District Court Erred In Not Sentencing the Defendant-Petitioner Pursuant to the Provisions of the "Fair Sentencing Act of 2010".

This Court should grant the Writ to resolve a split between the Circuit Court's regarding the issue of whether the provisions of the "Fair Sentencing Act of 2010" apply to a Petitioner whose offense conduct predated the effective date of the legislation (August 3, 2010) but whose sentencing occurred after the effective date of the Act.

The Seventh Circuit Court of Appeals has decided that the FSA would not apply to a Petitioner, like Corey Williams, whose offense conduct occurred prior to August 3, 2010 but was sentenced thereafter. See *e.g. United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011). Two Circuit Judges later dissented from the denial of rehearing *en banc*. *United States v. Fisher*, ___ F.3d ___, 2011 U.S. App. LEXIS 10561 (7th Cir. May 25, 2011).

The First Circuit has concluded that the new reduced FSA mandatory minimums would apply to a Petitioner such as Corey Hill whose offense conduct predated the passage of the FSA but was sentenced after the November 1, 2010 amendments to the Sentencing Guidelines. *United States v. Douglas*, ___ F.3d ___, 2011 U.S. App. LEXIS 10922 (1st Cir., May 31, 2011). More recently, the Eleventh Circuit Court of Appeals held that the FSA does apply if a Petitioner is sentenced after the effective date of the Act even if the offense conduct predated August 3, 2010. *United States v. Rojas*, ___ F.3d ___, 2011 U.S. App. LEXIS 12791 (11th Cir. June 24, 2011).

The plain terms of the Fair Sentencing Act, expressly and by necessary implication, indicate that Congress intended its ameliorative changes to be applied to defendants not yet sentenced as of August 3, 2010, the date the Act took effect.

On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, passed by Congress to "restore fairness to Federal cocaine sentencing." *See* Pub. L. No. 111-220, 124 Stat. 2372 (Preamble). The Act amends the Anti-Drug Abuse Act of 1986 ["1986 law"] by increasing the quantity thresholds that trigger the statutory mandatory minimum penalties for offenses involving cocaine base ("crack") under 21 U.S.C. §§ 841(b) and 960(b). The quantity triggering the five-year mandatory minimum was increased from 5 grams to 28 grams and the quantity triggering the 10-year mandatory minimum was increased from 50 grams to 280 grams. Pub. L. No. 111-220, § 2. These new quantity thresholds had the effect of reducing the statutory powder-to-crack ratio from 100-to-1 to approximately 18-to-1. For those defendants whose offenses involve more than 50 grams but less than 280 grams of crack, the Act also had the effect of reducing the statutory maximum penalty from life to forty years. The Act does not include a saving provision indicating that Congress intended the old law to apply to pending cases.

In section 8 of the Act, Congress gave the Sentencing Commission emergency authority, requiring action within no later than ninety days, to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." *Id.* § 8(2). On October 27, 2010, the Commission followed that directive by amending the Drug Quantity Table at USSG § 2D1.1 to reflect the 18-to-1 drug quantity ratio The Commission expressly stated that these amendments were intended to "account for" the Fair Sentencing Act's new mandatory minimum sentences, and further that its approach was intended to "ensure[] that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." USSC, Notice of a temporary, emergency amendment to sentencing guidelines and commentary, USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010).

In a letter dated November 17, 2010, the lead sponsors of the Fair Sentencing Act wrote a letter to Attorney General Eric Holder, urging him "to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment." (App. D). Senators Durbin and Leahy point out that Congress' goal in passing the Act "was to restore fairness to Federal cocaine sentencing as soon as possible," and that "every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." *Id.* They explain that "this sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment," and that the amended guideline will apply to "all defendants who have not yet been sentenced." *Id.* They note the "absurd result," "inconsistent with the purpose of the Fair Sentencing Act," should defendants "continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act." *Id.*

Applying the Fair Sentencing Act in this case means that Petitioner faced a 60-month mandatory minimum sentence, rather than the 120-month mandatory minimum under the old law.

Unlike other statutes in which Congress has expressly stated that it intended for old law to apply to pending cases or to a particular category of cases, Congress included no such saving provision in the Fair Sentencing Act. To the contrary, Congress included language plainly indicating its intent to end immediately the discriminatory injustice wrought by the 100-to-1 ratio under the old law. As a result, the general saving statute of 1 U.S.C. § 109 did not preclude application of the Fair Sentencing Act in this case.

At common law, the repeal of a criminal statute, or its re-enactment with increased or decreased penalties, would have abated all prosecutions not yet final. *Bradley v. United States*, 410 U.S. 605, 607-08, 93 S.Ct. 1151 (1973). In 1801, Chief Justice Marshall expressed the rule of abatement as follows:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a

> construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . [the law] ought always to receive a construction conforming to its manifest import. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside.

United States v. Schooner Peggy, 1 Cranch 103, 110 (1801).

The "reason for the rule," as later explained by this Court in *United States v. Chambers*, is that "[p]rosecution for crimes is but an application or enforcement of the law, and if the prosecution continues, the law must continue to vivify it." 291 U.S. 217, 226, 54 S.Ct. 439 (1934). Thus, a conviction "on direct review at a time when the conduct in question is rendered no longer unlawful by statute, must abate." *See Hamm v. City of Rock Hill*, 379 U.S. 306, 312, 85 S.Ct. 384 (1964) (citing *Bell v. Maryland*, 378 U.S. 226 (1964)).

Significantly, this "normal abatement rule covering pending convictions" "does not depend on the imputation of a specific intention to Congress in any particular statute." *Id.* at 313, 315. Rather, the rule generally "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer furnish any legislative purpose, and would be unnecessarily vindictive." *Id.* This rule "is to be read wherever applicable as part of the background against which Congress acts," thus it is "irrelevant that Congress" may not have specifically alluded to the question whether pending prosecutions would be abated. *Id.* at 312-13.[1]

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[1] In *Hamm*, this Court held that, in the absence of a saving clause and in light of Congress' purpose in enacting the Civil Rights Act of 1964, the "normal rule" of abatement applied to strike down pending state convictions for trespass resulting from sit-ins before its passage. 379 U.S. at 310-11. This Court also declined to preserve convictions for transporting liquor following

To prevent such abatements that might arise from legislative inadvertence, Congress passed the federal saving statute in 1871, now codified at 1 U.S.C. § 109. *See Hamm*, 379 U.S. at 314-15.

Section 109 provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

While the federal saving statute supplies a general rule of statutory construction, this Court explained over one hundred years ago that it "cannot justify a disregard of the will of Congress as manifested either expressly or *by necessary implication* in a subsequent enactment." *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313 (1908) (emphasis added). Thus, the rule does not apply if by "necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the [saving statute]." *Id.* at 465; *see also Hertz v. Woodman*, 218 U.S. 205, 217, 30 S.Ct. 621 (1910) (general saving statute is a "rule of construction [] to be read and construed as part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress").

In its most recent analysis of the general saving clause, this Court again recognized that a later enactment can "expressly or by necessary implication" supersede the general

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the passage of the Twenty-first Amendment, which abolished Prohibition era laws. *United States v. Chambers*, 291 U.S. 217 (1934).

saving clause by indicating Congress's intent to abate prosecutions under the old law. In *Marrero v. Warden Lewisburg Penitentiary* 417 U.S. 653, 655-57, 94 S.Ct. 2532 (1974), this Court considered, on habeas corpus review, whether certain drug offenders sentenced under a law that made them categorically ineligible for parole could benefit from the Comprehensive Drug Abuse Prevention and Control Act of 1970, a new statute abolishing the restriction on parole. The new statute contained a saving clause specifically preserving the harsher penalties for "prosecutions for any violation of law occurring prior to the effective date of [the Act]." *Id.* at 656-57 & n.4.

Answering the narrow question whether sentencing "is part of the concept of 'prosecution,'" this Court held that the specific saving clause contained in the new statute preserved the parole restrictions for those sentenced under the old law. *Id.* at 657-58. It further held that ineligibility for parole is an element of "punishment" and thus a "penalty, forfeiture, or liability" under 1 U.S.C. § 109 surviving the repeal. Focusing as it did on whether the parole restriction of the old law constituted a "penalty" under § 109 (and given the dispositive saving clause included in the new law), the Court in *Marrero* did not address whether the new statute either "expressly or by necessary implication" released or extinguished a previous harsher penalty. This Court nevertheless reaffirmed the principle that a later enactment can be viewed as superseding an earlier one when it "can be said by fair implication or expressly to conflict" with it. *Marrero*, 417 U.S. at 659 n.10 (citing *Great Northern Ry.*).

More recently, Justice Scalia emphasized, in his concurring opinion in *Lockhart v. United States*, 546 U.S. 142, 148, 126 S.Ct. 699 (2005), that the Court has consistently "made clear" that an earlier Congress cannot use an "express-statement provision" (such as the one contained in the general saving clause) to "nullify the unambiguous import of a subsequent statute." *Id.* (Scalia, J., *concurring*) (citing *Great Northern Ry.*, 208 U.S. at 465). He reiterated that "[a] subsequent Congress [] may exempt itself from such requirements by 'fair implication' – that is, *without* an express statement." *Id.* (Scalia, J., *concurring*) (emphasis in original) (citing *Marrero*, 417 U.S. at 659-60 n.10; *Hertz v. Woodman*, 218 U.S. at 218)). As Justice Scalia put it, a subsequent Congress need not use any "magical password" to indicate its intent "[w]hen the plain import of a later statute directly conflicts with an earlier statute." *Id.*

The structure and language of the Fair Sentencing Act indicate, either by its express terms or by "necessary implication," that Congress intended the Act's ameliorative changes to apply as soon as possible, and to all pending cases. Most obviously, Congress passed the Fair Sentencing Act to "restore fairness" to crack sentencing, addressing longstanding concerns regarding the racially disparate impact of the 100-to-1 ratio contained in the 1986 law, which turned out to be without evidentiary basis. In addition (and unlike the statute at issue in *Marrero*), the Fair Sentencing Act does not include a specific saving provision. To the contrary, Congress expressly granted the Sentencing Commission emergency authority to promulgate amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act," and specifically directed that it "*shall* [] make such conforming amendments to the sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." *See* Pub. L. No. 111-220, § 8 (Aug. 3, 2010).

Also significant is the fact that the provisions of the FSA are markedly different from those in H.R. 265, the House bill described as the "underpinnings" of S. 1789, the bill ultimately enacted as the Fair Sentencing Act of 2010. *See* 156 Cong. Rec. H6199, H6199-202 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee). Unlike S. 1789, H.R. 265 contained a saving provision specifically stating that "there shall be no retroactive application of any portion of this Act." *Id.* at H6202 (H.R. 265 sec. 11). In addition, H.R. 265 directed only that the Commission "in its discretion, *may* [] promulgate amendments" pursuant to its emergency authority, and only "*may* [] make such conforming amendments as the Commission determines necessary to achieve consistency with other guidelines and applicable law." *Id.* H6201 (H.R. 265 sec. 8) (emphasis added). H.R. 265 was not to be effective for 180 days after the date of its enactment. In contrast, S. 1789 contained *no* saving clause, contained *mandatory* directives to the Sentencing Commission, and was to be effective on the date signed by the President.

Following Congress' mandate, the Commission achieved consistency with the Fair Sentencing Act when it amended § 2D1.1 so that effective November 1, 2010, "the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010).

In addition to the provisions of the Fair Sentencing Act, Congress requires (and has required since 1984) that courts at every initial sentencing apply the guidelines that "are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(ii). Pursuant to this provision, and in conjunction with the emergency amendments Congress deemed necessary to "restore fairness" in sentencing crack offenders, Congress now *requires* courts to calculate the advisory guideline range by applying the amended guideline reflecting the new 18-to-1 ratio at every base offense level, including for those whose offense conduct occurred before August 3, 2010. It would make no sense at all for Congress to require courts to apply the amended guideline to all defendants, resulting in advisory guideline ranges for all calibrated to the 18-to-1 ratio, while at the same time categorically preventing many of the least serious offenders from actually benefitting from their lower advisory guideline range due to the trumping operation of the old mandatory minimums. Such an interpretation would fundamentally undermine Congress' goal of reducing penalties for the least serious offenders.

As emphasized by Justice Scalia in 2005, Congress was not required to use any "magical passwords" to make its intent clear. Taken together, Congress' directive to the Commission in the Fair Sentencing Act to "achieve consistency" with applicable law and its directive to courts to apply the guidelines as amended in every case clearly demonstrate, either expressly or by "necessary implication," Congress' intent to "restore fairness" to all defendants not yet sentenced.

IV

CONCLUSION

For these reasons, Petitioner asks this Honorable Court to grant the Writ of Certiorari, reverse the decision of the Seventh Circuit Court of Appeals and Order the District Court to sentence Petitioner pursuant to the provisions of the "Fair Sentencing Act of 2010"..

Respectfully submitted,

Stephen E. Eberhardt

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APPENDIX A

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 6, 2011*
Decided April 7, 2011

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 10-3837

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
v.	No. 08 CR 486-1
COREY A. HILL, *Defendant-Appellant.*	John W. Darrah, *Judge.*

ORDER

The Fair Sentencing Act of 2010, which took effect on August 3, 2010, raised from 50 to 280 grams the amount of crack cocaine necessary to trigger a statutory minimum term of imprisonment of 10 years, and from 5 to 28 grams the amount needed to trigger a minimum term of 5 years. *See* PUB. L. NO. 111-220, § 2(a), 124 STAT. 2372, 2372 (2010); 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii).

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* After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* FED. R. APP. P. 34(a)(2)(C).

In 2009, a jury found Corey Hill guilty of possessing 50 or more grams of crack with intent to distribute. *See* 21 U.S.C. § 841(a)(1). At sentencing, in December 2010, the district judge relied on our decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), *petition for cert. filed*, ___ (U.S. Mar. 4, 2011) (No. 10-9409), and concluded that the Fair Sentencing Act did not apply retroactively to Hill. The judge thus sentenced Hill to 120 months in prison, which was the statutory minimum because his offense was committed before the Act took effect. The judge noted, however, that he would have imposed a term of 51 months if not for the statutory minimum.

Hill's only argument on appeal is that the Fair Sentencing Act should apply to any defendant sentenced after its enactment, even if the underlying crime was committed before. That, he contends, was Congress's intent, as evidenced by the language of the Act and its legislative history. For Hill, that would have meant a minimum of 5 years, not 10. But we recently rejected the same argument in *United States v. Fisher*, Nos. 10-2352 & 10-3124, 2011 WL 832942, at *3 (7th Cir. Mar. 11, 2011), where we reaffirmed our holding in *Bell* that the Fair Sentencing Act does not apply retroactively and added that the relevant date for determining whether the Act applies is the date of the offense conduct, rather than the date of sentencing.

Accordingly, we AFFIRM the judgment of the district court.

APPENDIX B

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John W. Darrah	**Sitting Judge If Other than Assigned Judge**	
CASE NUMBER	08 CR 486-1	**DATE**	12/9/10
CASE TITLE	United States v. Corey Hill		

DOCKET ENTRY TEXT

Defendant's motion to reconsider [99] is denied.

■[For further details see text below.]

Docketing to mail notices.

STATEMENT

On December 2, 2010, the Court sentenced Defendant to the mandatory minimum of 120 months' imprisonment for possession with intent to distribute crack cocaine. Before the Court is Defendant's Motion to Reconsider. Defendant argues, as he did at sentencing, that the ten-year mandatory minimum should not apply due to the recent passage of the Fair Sentencing Act ("FSA"). The Court found that under the controlling precedent of *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), the FSA does not apply retroactively and, thus, did not affect the mandatory minimum in this case. Defendant's motion does not affect the conclusion that *Bell* is controlling. Therefore, Defendant's motion is denied.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,)
Plaintiff,)
)
-vs-) Case No. 08 CR 486
)
COREY A. HILL,) Chicago, Illinois
) December 2, 2010
) 1:00 o'clock p.m.
Defendant.)

TRANSCRIPT OF PROCEEDINGS - SENTENCING
BEFORE THE HONORABLE JOHN W. DARRAH

APPEARANCES:

For the Plaintiff:
HON. PATRICK J. FITZGERALD
United States Attorney
BY: MR. MICHAEL LANG
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604

For the Defendant:
LAW OFFICES OF STEPHEN E. EBERHARDT
MR. STEPHEN E. EBERHARDT
16710 Oak Park Avenue
Tinley Park, Illinois 60477

ALSO PRESENT:
MS. TRACY PHILLABAUM
United States Probation Officer

Mary M. Hacker
Official Court Reporter
United States District Court
219 South Dearborn Street, Suite 1212
Chicago, Illinois 60604
Telephone: (312) 435-5564

THE CLERK: 08 CR 486, United States versus Corey
Hill.

MR. EBERHARDT: Good afternoon, your Honor. Steve
Eberhardt on behalf of Mr. Hill, who is here now.

THE COURT: Good afternoon, Mr. Eberhardt.

MR. LANG: Good afternoon, your Honor. Michael
Lang for the government.

THE COURT: Good afternoon, Mr. Lang.

PROBATION OFFICER: Tracy Phillabaum, United States
probation.

THE COURT: Good afternoon. You did a very fine
job on your report. I think I mentioned that before.

PROBATION OFFICER: Thank you.

THE COURT: Good afternoon, Mr. Hill.

THE DEFENDANT: Good afternoon.

THE COURT: This matter comes on for sentencing.
We've already conducted part of the sentencing hearing.
Mr. Hill, you have received a copy of the
presentence investigation report, have you not, and you've
read it?

THE DEFENDANT: Yes, sir.

THE COURT: As have you, Mr. Eberhardt, and you,
Mr. Lang.
At the last hearing the Court had made certain
determinations regarding the application of the crack to

powder ratio, and I had entered a minute order finding that the appropriate ratio would be one-to-one, crack to powder ratio. I also had determined that the criminal history was a Category 5.

Mr. Lang, do you agree -- I know you might not agree with my determination, but you agree I've made those determinations?

MR. LANG: Yes. And I would apologize to the Court, your Honor. In my second submission I messed up. I think I had in there calculating Mr. Hill as a 6. That was my error, your Honor. I forgot to take out that --

THE COURT: That one point that has no longer -- is no longer being applied.

MR. LANG: Yes. So it went from I think 13, your Honor, to 12. So that was my mistake.

So under the -- at least under the guidelines that are in effect now, your Honor, I believe the range would be 110 to 137.

THE COURT: Well, the guidelines as I determined them to be --

MR. LANG: I'm sorry, sir. I mean, assuming --

THE COURT: Assuming the presentence investigation guidelines and their ratio was applied.

But based on the ratio of one-to-one, it would result in a total offense level of 16 and a criminal history category of 5, which would produce a guideline suggested range of confinement of 41 to 51 months.

MR. EBERHARDT: Yes.

THE COURT: Now the issue, of course, is the application of the ten-year -- and I should ask you again, is there anything that should be spread of record regarding any objections that you have to the report that we haven't already discussed, Mr. Eberhardt?

MR. EBERHARDT: Not that we've already discussed, your Honor.

THE COURT: All right. And, Mr. Lang, the same is true with you?

MR. LANG: Yes, sir.

THE COURT: Okay. Now the question is whether or not the Fair Sentencing Act of 2010 abrogates the application of the mandatory sentence of, in this case now, ten years.

The government has dismissed its 851 information, I take it, Mr. Lang?

MR. LANG: Yes. The Court dismissed that, your Honor.

THE COURT: I dismissed that after -- there was a hearing on that issue. I recall that. I dismissed that.

So the exposure now, if the mandatory provisions are in effect, would be ten years. If the Fair Sentencing Act excuses the application of that -- or obviates the application of that, then Mr. Hill would be eligible as a serious trafficker of a five-year mandatory minimum. Is that right, Mr. Eberhardt?

MR. EBERHARDT: Yes.

THE COURT: All right. Okay.

You've made several arguments -- I should say, I went back and read everything. There were several sentencing memoranda that had been filed prior to this issue, going back to 2009. I read all of those. And I re-read the sentencing investigation report. And each of you have provided upward of -- position papers -- Mr. Lang, you filed a supplemental position paper on January 8th of this year. Mr. Eberhardt, you filed a second supplemental sentencing memorandum on October 25th of this year. And, Mr. Lang, you filed a response to that on October 29th of this year.

Mr. Eberhardt, you provided the Court with an opinion by Judge Hornby, a district judge in Maine, and the application of the 2010 Fair Sentencing Act to the mandatory minimum provisions. And Judge Hornby concluded, based on the text of the act, its title, its preamble, the emergency authority afforded to the Commission and the Sentencing Reform Act of 1984 -- he concluded that congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct had occurred before the enactment. And I'm citing from --

I've got a Lexis cite of 2010 U.S. District Lexis, 114464.

Mr. Lang, you provided me with a Seventh Circuit opinion, United States of America versus Christopher C. Bell, and I have a Westlaw cite on that as 2010 WL 4103700. And that's a Seventh Circuit opinion that was decided on October 20th of this year, and they reach a different conclusion.

In your papers, Mr. Eberhardt -- and you did a really fine job.

MR. EBERHARDT: Thank you, your Honor.

THE COURT: You made an excellent argument here.

MR. EBERHARDT: I have to thank all the staff federal defenders around the country working on the issue also.

THE COURT: I did notice a certain similarity of language between your memorandum and some of the language in those other cases, but I guess that's what research is all about.

The principal argument in your papers is the issue of the application of the general saving statute. And then you make some other arguments, which I think you've made before, regarding the application of the mandatory guidelines as would be in conflict with the equal protection clause with Eighth Amendment prohibition against cruel and unusual punishment -- I should say the Fifth Amendment clause regarding equal protection and some other issues which, frankly, I think are not as persuasive as the issue regarding the application of the savings statute.

As I read the Bell case, I think the Bell case ironically is squarely on point here. In the Bell case, as in here, if the minimum quantity of crack required to trigger the mandatory minimums was as determined by the 2010 Fair Sentencing Act, Mr. Hill would be deemed to be a serious trafficker; that is, someone that had trafficked in 28 grams but not more than -- but not 280 grams, would be a serious trafficker, which would result in a -- in this case, a 30-month -- no, a 60-month sentence of five years.

If he were found to be a major trafficker under the old law, then the ten-year mandatory minimum sentence would be in effect.

The Seventh Circuit discusses the same cases that you raised and that appear in Judge Hornby's opinion as well. You make a very persuasive argument relying on United States versus Kolter, and that's cited in both your papers beginning on Page 6 and in the Seventh Circuit opinion in Bell.

In Kolter your argument was that the redefinition simply redefined the class of individuals that was subject to the punishment and didn't change the punishment. Hence, the savings clause was inapplicable. And in this case, because of the new act, that Mr. Hill would simply be defined --

redefined now as a serious trafficker, not a major trafficker.

The Seventh Circuit, Judge Tinder writing for the majority, squarely rejects that interpretation and distinguishes Kolter from its application here.

You also argue that the savings statute does not bar retroactive application of the Fair Sentencing Act of 2010 because it is curative or remedial. And you cite Mechem; that's a Tenth Circuit 1975 case construing an analgous statute, 509 F2d 1193, as well as United States versus Blue Sea, 533 F2d 445, and that's a Fifth Circuit 1977 case. You cite those cases in your papers on Pages 13 and 14 of your second supplemental sentencing memorandum.

And again, Judge Tinder, writing for the majority of the Seventh Circuit opinion in Bell, distinguishes those cases and finds them inapplicable.

I think the Seventh Circuit opinion is binding on this Court and, therefore, I hold that the 2010 Fair Sentencing Act does not apply retroactively to conduct committed before its effective date.

Your arguments were really well made, as were yours, Mr. Lang. I don't want to preclude you from making any other formal statements, should you choose, but I've read everything you gave me and I've read all those cases.

Anything further you want to say, Mr. Eberhardt?

MR. EBERHARDT: Yes, Judge.

I would just like to add, obviously the government is relying on the Bell case, and my experience has been now, since the Fair Sentencing Act went into effect, apparently the government's position -- and obviously Mr. Lang will correct me if I'm wrong -- is because Mr. Hill --

THE COURT: He might even correct you if you're right.

MR. EBERHARDT: That could be, too -- because Mr. Hill was arrested prior to August 3rd, 2010, he's subject to the old law of the mandatory minimums.

The government's position that I've been seeing throughout this building now is if somebody is arrested on August 2nd of 2010 and they go to trial and they are found guilty and they are sentenced in 2014, 2015, the government is going to come in here and they're going to say, you know what? You were arrested on August 2nd of 2010, so the old law applies to you because of the savings clause in 109.

But the trouble I have with that, Judge, is we also have emergency guideline amendments that went into effect -- I'll digress a minute.

Bell -- and as Judge Hornby in Maine points out, Bell is a case, and all the cases cited by the Seventh Circuit, are cases where a defendant was sentenced, and then when the case was pending on appeal, a motion was made attacking the prior sentence. So it's not a situation of where the sentencing had not been imposed subsequent to the Fair Sentencing Act.

But sometimes --

THE COURT: I considered that, Mr. Eberhardt, and I -- Judge Hornby's language at the end of the opinion says, quote, I conclude, based on the context of the act, its title, its preamble, the emergency authority afforded to the Commission and the Sentencing Reform Act of 1984, that congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before the enactment.

And I think both sides -- I think both Bell and Moreno -- pardon me, Douglas both agree that the issue is whether or not the act applies retroactively to the time of the conduct of the offense. I don't see sentencing after conviction as being anything that is particularly operative in determining the application of the savings clause. I think it's when the conduct occurred.

If you've got any authority on that, I would sure look at it. But I didn't see anything like that in any of those cases. The focus seems to be at the time of the occurrence, which generally is consistent with the application of criminal law.

MR. EBERHARDT: But I would --

THE COURT: I understand that distinction and it occurred to me as well.

MR. EBERHARDT: And I would, for the purposes of the record, then point out to the Court, Judge Hornby further, beyond what you've read, your Honor -- in the words of the Supreme Court, is either, quote, a necessary implication, unquote, or a, quote, fair implication, unquote, that although retroactivity to those previously imprisoned might not be contemplated, meaning the Bell situation, the Fair Sentencing Act of 2010 permits no further federal crack sentencings that are not fair.

THE COURT: I think that is a reference to the underlying basis of his opinion. I don't think that necessarily -- I think he's saying that based on the act, the legislative history, that congress simply intended the act to be applicable retroactively because it has now recognized the unfairness in the mandatory sentences.

I don't see as operative in that phrase -- and it might have been that phrase that triggered this inquiry in my mind as well. I don't see anything as operative in that phrase that would distinguish between somebody that has been convicted and not yet sentenced and someone that has been sentenced when in both instances the conduct occurred before the effective date of the new act.

I see your point but I don't see that as terribly operative.

MR. EBERHARDT: But I would add one more point then, Judge.

To use the mandatory minimums under the old law basically negate the guideline amendments that went into effect November 1st, not necessarily in a situation like Mr. Hill because of the amount, but there will be cases where the guidelines -- well, actually it is in this case -- there will be cases where the new guidelines -- if he was sentenced under the new guidelines, which obviously we all know --

THE COURT: Except I gave him a benefit greater than what's provided in the new guidelines.

MR. EBERHARDT: And under the new guidelines your Honor obviously can still do that. I just got done with a sentencing in front of Judge Coar where Judge Coar had not made a previous one-to-one finding, and just two weeks ago he said, even with the Fair Sentencing Act's 18-to-1, I am still going to find one-to-one. And it was based on information -- I don't know if I have the article, but again, I'm sure you're aware of it, I'm sure the government is aware of it, in the Daily Law Bulletin, where Judge Castillo made comments. He was the only individual on the Sentencing Commission who voted against the 18-to-1 and made comments about actually it should be the one-to-one based on what judges have been finding for the past two or three years now.

And that was based on Senator Durbin coming to Judge Castillo saying, well, you know, this compromise legislation of 18-to-1 doesn't necessarily mean that the sentencing guidelines have to be 18-to-1; it could be something different. And, unfortunately, Judge Castillo lost.

But by using the mandatory minimums and taking -- you know, aside from the fact that you've already found one-to-one, which I suggest needs to be done, a district judge, like Judge Coar, still has -- and your Honor -- has the discretion to determine one-to-one, but it makes the guidelines absolutely meaningless.

So the guidelines -- so congress, on the one hand, said, put into effect new guidelines, the new guidelines come into effect --

THE COURT: But maintain the mandatory minimums. I agree with you. There's a certain inconsistency.

It seems to me it's curious that congress can now negotiate the amount of social harm that's occasioned by the distribution of crack cocaine as opposed to regular cocaine, that we can arrive at that not scientifically but through some sort of legislative compromise. But I guess that's the way our government runs.

You're preaching to the choir, Mr. Eberhardt, but I read Bell as absolutely dispositive in this case.

Mr. Lang, I know you don't have anything to say in disagreement to that.

MR. LANG: I have nothing to say, your Honor.

THE COURT: So I find that, as I said earlier, that the total offense level is a Level 16, the criminal history category is a Category 5.

But for the mandatory minimum of ten years, I would have sentenced Mr. Hill, considering the 3553 factors, to a sentence at the high end of the guideline range of 51 months. He would have been considered a serious trafficker if the statute were to be applied retroactively, and I would have been required to impose a sentence of 60 months.

Any other disputed issues that we have to resolve?

MR. EBERHARDT: No. I just bring up, Judge, that Mr. Hill has some family members who would like to address the Court.

THE COURT: Good afternoon all.

MR. EBERHARDT: And Mr. Hill would like to address the Court.

THE COURT: All right. Do you want to call them up as you wish, Mr. Eberhardt?

Can I also say, just for the record -- I think I brought this up before. I've read now several times your letter, Mr. Hill, to me. The envelope was dated back in, I think, January of this year -- yes, January 23rd. I've read it and I've considered everything you had to say in there.

THE DEFENDANT: Okay.

THE COURT: Okay. Good afternoon.

MS. WRIGHT: Good afternoon. My name is Juanita Wright. I'm the mother of Corey Hill's child. And I just would like to say that I need for my baby here to get out of jail because I have health problems. I have a heart problem, I have mental illness -- I have a mental illness, and with him being gone, it's like -- it's hard raising three kids all by myself. It's like -- every day is like a struggle for me, and it's like -- I just need somebody there to help me. And that's all I got to say.

THE COURT: Thank you.

MS. COOKE: Good afternoon, Judge.

THE COURT: Would you say your name, please?

MS. COOKE: My name is Bridget Cooke. I'm Corey's mom.

THE COURT: Good afternoon, Ms. Cooke.

MS. COOK: Thank you.

Well, I'm here to say that, as you can see, if you read his letter, you know that he's smart; he's an intelligent child.

THE COURT: I believe you are, Mr. Hill.

MS. COOKE: Yes. And I just want you to have a little leniency on him because he do have not just one, he have two children. Corey, Jr., he sent you a letter back a few months ago, but I think he sent it to the wrong address. I'm not sure --

THE COURT: Do you have a copy of that now?

MS. COOKE: No, I didn't.

THE COURT: I don't see a letter.

Do you have that, Mr. Eberhardt?

MR. EBERHARDT: Judge, I thought the letters were --

THE COURT: Is that the one I just referred to or --

MR. EBERHARDT: I recall -- I thought probation had a letter from Corey Hill, Jr., Judge. I don't have it with me right now.

THE COURT: Well, I may have read it in the past. I don't have it --

PROBATION OFFICER: Your Honor, I don't believe I have any letters from his son.

THE COURT: Okay. Well, if you had a copy --

MS. COOKE: No, I didn't have a copy. But in the letter he stated that he's 13 now and it seems like he's getting in more trouble, going down maybe the same road, and he needs his dad. And that's what he was trying to write to you and tell you.

I have health problems, too, and so, therefore -- sometimes I have him when his mom can't control him. I can't either. He need his dad.

So that's all I have to say. He needs to be home for that.

THE COURT: Thank you, Ms. Cooke.

MS. COOKE: You're welcome.

THE COURT: Good afternoon. Could you say your name, please?

MS. HILL: Shacorey Hill.

THE COURT: Say it one more time.

MS. HILL: Shacorey Hill.

THE COURT: Shacorey.

MS. HILL: I want my daddy to come home because I miss him and I want him to be there because I need him.

THE COURT: Thank you.

MS. BEVERLY: Good afternoon, Judge. My name is Yolanda Beverly. I'm Corey Hill's little sister.

THE COURT: Good afternoon, Ms. Beverly.

MS. BEVERLY: Since my brother got locked up I haven't seen my brother. I don't like to see him like this.

I have two brothers and I'm 29 years old. All my life I've only had my mom and my two brothers because we didn't have a dad around. I know a lot of the things my brother did was wrong, but I'm a mother of three and I'm also a wife. My mom is very sick. My mom depends on me a lot and it's taken a toll on me. I'm not saying forgive my brother for everything he's done. I'm just asking for a little lenience on him.

I need help. My marriage is falling apart because I'm always running for my mom back and forth from the hospital, but I tell my husband that's all I've ever had. So to leave her by herself, I can't, because they never left me.

As my mom said, times are getting hard. My brother needs to be home with his kids. I can't be there every step of the way, and I have two girls and a son of my own that I'm trying hard to raise. Working two jobs is very, very hard. I tell my mom I can't be here all the time, but I know she needs me, so I try.

Judge, I'm asking that you send my brother home so that he can save my nephew's life, because he's not going down the right path. And it seems like with him home, he's so controllable. I wish I would have brought his progress reports from when his dad was home. He was a straight A student until he left and now it just seems like he's showing out because he's not here for that discipline. He doesn't have a dad in his life.

I don't want to see my nephew here, I don't want to speak on his behalf, and I don't want to bury him. We've lost so many family members this year. My great grandmother passed and he was not here, which is one of her favorites, and we always tease him that that's her favorite. And she's gone now; we don't have her.

Please help my brother save his son's life, please. Thank you.

THE COURT: Thank you.

Mr. Eberhardt?

MR. EBERHARDT: Judge, I believe that's all for the family members.

THE COURT: All right. Do you have anything else to offer, Mr. Eberhardt, as far as testimony?

MR. EBERHARDT: Just Mr. Hill, Judge.

THE COURT: We'll do that in allocution.

Do you want to make some comments regarding sentencing, Mr. Eberhardt?

MR. EBERHARDT: Judge, I don't know what more to say. I think we're stuck. I know this is a very difficult position for your Honor and the courts generally to be in. That's why -- and I also realize the binding precedent in the Seventh Circuit on district court judges around these three states.

All I can say, Judge, is obviously I think that Judge Hornby's position would give the Court enough latitude to make a finding and let the Seventh Circuit review it. But I realize where the Court is at, Judge.

THE COURT: Thank you, Mr. Eberhardt.

Mr. Lang?

MR. LANG: Nothing, your Honor.

THE COURT: Mr. Hill, you have the absolute right to continue to remain silent. You have an absolute right to speak, the right of allocution that's afforded anyone facing a sentence in a federal criminal courtroom.

Is there anything you would like to say?

THE DEFENDANT: Yes, your Honor.

I have put some things together to address the Court today.

Before I proceed I would like to apologize to my family and my loved ones for the pain and suffering they endured through my incarceration. I would also like to apologize to the courts and fellow Americans for my participation in crime.

I have many regrets and I am shameful for my actions. It's kind of hard for me sitting here watching my daughter, and my mother, my baby's mother and my sister come up here crying and pleading for my life.

I had more to say but it's hard for me to speak, so I just leave it with that. Thank you.

THE COURT: Thank you.

Pronouncing a sentence on another person, another human being, is probably the most difficult part of this job, but it's part of the obligation that I assumed when I became a judge.

The United States Congress has given me some direction as to how a sentence should be considered and what kind of a sentence should be imposed. I'm obligated to impose a sentence that is necessary but not greater than necessary to provide just punishment, adequate deterrence, protection to the public and any needed training or treatment. And in doing that, I'm directed to consider certain factors.

I'm supposed to consider the nature and history of the offense. Mr. Hill, we've debated the intricacies of the federal sentencing laws and the policies behind them and whether or not a mandatory sentence is appropriate in this case or required in this case or whether it's not. But that should not obscure the fact that your conduct, the conduct that you participated in, the distribution of drugs, possesses a real threat to our society, particularly the people in your own community. And it appears that you were doing this for the simplest and most basic of all reasons, and that is for some money. So when you consider the nature and history of the offense, this conduct is serious.

Your sister commented a moment ago about the risk that your son faces growing up without you present, and that certainly is a very real thing and something I'm going to comment on in a moment. But, on the other hand, your conduct put people like your son and others close to his age in jeopardy by dealing drugs in that community, and I hope that's something you reflect upon during the rest of your life.

I'm also directed to consider the history and characteristics of you. You are 31 years old?

THE DEFENDANT: Yes, sir.

THE COURT: You amassed a major criminal history on this point. I mean, you've been in and out of jail -- or in and out of the courts since you were a very young man. And that's something that I'm required to consider as well.

I'm also to consider the sentencing guidelines. And the guidelines in this case, as I determine them to be, would require a sentence not to exceed 51 months if the guidelines were to be followed. And that's something that I will consider as well.

I am to consider the kinds of sentences available, any training or treatment that you require, and any policy statements that have been promulgated regarding the offense that you stand convicted of. And we've considered the statements made by the United States Attorney General and the like regarding the crack cocaine sentencing laws. To the extent that that's what 3553 contemplates, I certainly considered all of that.

On the plus side of the ledger, considering your own personal history and characteristics, and imposing a sentence that will provide adequate deterrence to you as well as adequate deterrence to other people that are similarly inclined to commit these kind of offenses, I do recognize some growth on your part. The fact that you've achieved a high school diploma while you have been incarcerated is something that argues very favorably for you. And your mother -- your sister pointed out that you're not a dumb fellow, and I agree with that. You're obviously a very bright guy.

In addition, I've considered the extreme hardship to your family, particularly your child, and -- or your children, who will be without the assistance of their father during their formative years, the impact that your incarceration will have on your mother and your sister. Those are certain things that I would consider as well.

Mr. Eberhardt hit it on the head. The Seventh Circuit has rendered an opinion that requires me to sentence you to a term of at least 120 months.

So based on that rule of law, which I'm obligated to follow, pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that you're committed to the custody of the Bureau of Prisons for a term of 120 months.

I recommend to the Bureau of Prisons that you participate in a comprehensive drug and alcohol treatment program.

Because of your financial condition, no fine or cost of imprisonment or supervised release shall be imposed. However, you shall pay a special assessment of $100, which is payable and due immediately.

Upon release from prison, you shall be placed on a period of supervised release for a term of ten years. Within 72 hours of release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district where you are released.

While on supervised release you shall not commit any other federal, state or local crimes.

You shall comply with the standard conditions that have been adopted by this Court.

You shall refrain from the unlawful use of a controlled substance.

You shall submit to one drug test within 15 days of release from prison and random drug tests thereafter, not to exceed 104 tests per year.

You shall not possess a firearm or other destructive device.

You shall cooperate in the collection of a sample of DNA from your body, if required by statute, at the direction of the probation officer to whom you are assigned.

You shall participate in a drug aftercare and alcohol aftercare treatment program at the discretion and direction of the probation officer to whom you are assigned.

You shall also participate in a mental health treatment program at the direction of the probation officer to whom you are assigned and take any medications that are prescribed.

I also recommend to the Bureau of Prisons that you be evaluated, that your mental health be evaluated and that you be afforded the opportunity to participate in any mental health treatment programs the Bureau of Prisons has to offer as well.

You shall pay $1,300 to the Bureau of Alcohol, Tobacco, Firearms & Explosives as compensation for funds that you received during the investigation of this case.

Upon completion of your term of imprisonment, the balance of any financial obligation shall become a condition of supervised release, and you shall make monthly payments of at least ten percent of your net monthly income.

Mr. Hill, you can appeal your conviction if you believe that there were any errors that were committed during your trial. You also can appeal your sentence if you believe your sentence was contrary to the law.

You may apply to appeal in what the law calls in forma pauperis. That means that if you qualify, the cost of preparing and filing an appeal will be waived.

The Clerk of the Court will prepare and file a notice of appeal upon your request. With very few exceptions, any notice of appeal must be filed within 14 days of the entry of this judgment.

Do you understand what I've just said, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Eberhardt, I direct you to consult with Mr. Hill. If it's his intention to file a notice of appeal, I'll ask you to assist him in doing so.

MR. EBERHARDT: Judge, we have discussed that and there will be one filed.

THE COURT: All right.

Mr. Hill, you made some very serious mistakes in your life and I think probably by this time you're starting to recognize that. And, unfortunately, the conduct that you've committed has effects not only on yourself but on people that you hold very dear to you. You're going to pay for those mistakes for, unfortunately, a significant amount of time.

On the other hand, you're a young man and you have the advantage of having people that love and support you. I really urge you to take this period in your life, reflect on where you've been and where you could be in a positive fashion and how you could make some contribution to these people that have supported you.

Good luck to you, sir.

THE DEFENDANT: All right.

THE COURT: Is there a recommendation, Mr. Eberhardt?

MR. EBERHARDT: No, Judge.

MR. LANG: Thank you, your Honor.

THE COURT: Good to see you both.

(Which were all the proceedings heard.)

CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ *Mary M. Hacker* *December 14, 2010*

Mary M. Hacker
Official Court Reporter

Date

APPENDIX D

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 17, 2010

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

Thank you for your leadership in urging Congress to pass the Fair Sentencing Act of 2010 (P.L. 111-220). As the lead sponsors of the Fair Sentencing Act, we write to urge you to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment.

The preamble of the Fair Sentencing Act states that its purpose is to "restore fairness to Federal cocaine sentencing." While the Fair Sentencing Act did not completely eliminate the sentencing disparity between crack and powder cocaine, as the Justice Department had advocated, it did significantly reduce the disparity. We believe this will decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities.

Our goal in passing the Fair Sentencing Act was to restore fairness to Federal cocaine sentencing as soon as possible. As Senator Durbin said when the Fair Sentencing Act passed the Senate: "We have talked about the need to address the crack-powder disparity for too long. Every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." You expressed a similar sentiment in testimony before the Senate Judiciary Committee, when you urged Congress to eliminate the crack-powder disparity: "The stakes are simply too high to let reform in this area wait any longer."

This sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment to the Sentencing Guidelines. The revised Guidelines took effect on November 1, 2010, and will apply to all defendants who have not yet been sentenced.

And this sense of urgency is why the Fair Sentencing Act's reduced crack penalties should apply to defendants whose conduct predates enactment of the legislation but who have not yet been sentenced. Otherwise, defendants will continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act. This absurd result is obviously inconsistent with the purpose of the Fair Sentencing Act.

As you know, Judge D. Brock Hornby, an appointee of President George H.W. Bush, recently held that the Fair Sentencing Act's reduced mandatory minimums apply to defendants who have not yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? ... I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." We wholeheartedly agree with Judge Hornby.

We were therefore disturbed to learn that the Justice Department apparently has taken the position that the Fair Sentencing Act should not apply to defendants who have not yet been sentenced if their conduct took place prior to the legislation's enactment. In his opinion, Judge Hornby states that the Assistant U.S. Attorney in the case said he understood this to be the position of the Department of Justice.

Regardless of the legal merits of this position, the Justice Department has the authority and responsibility to seek sentences consistent with the Fair Sentencing Act as a matter of prosecutorial discretion. This is consistent with your view that reforming the sentencing disparity "cannot wait any longer." It is also consistent with the Justice Department's mission statement, which states that the Department should "seek just punishment for those guilty of unlawful behavior" and "ensure fair and impartial administration of justice for all Americans." As you said in your May 19, 2010 Memorandum to All Federal Prosecutors on Department Policy on Charging and Sentencing, "The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws." Indeed, it is the Justice Department's obligation not simply to prosecute defendants to the full extent of the law, but to seek justice. In this instance, justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.

Therefore, we urge you to issue guidance to federal prosecutors instructing them to seek sentences consistent with the Fair Sentencing Act's reduced mandatory minimums for defendants who have not yet been sentenced, regardless of when their conduct took place. Additionally, please provide us with any guidance that you have already issued to federal prosecutors regarding implementation of the Fair Sentencing Act.

Thank you for considering our views. We look forward to your prompt response.

Sincerely,

Dick Durbin

Patrick J. Leahy

No: ___________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

COREY HILL, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

NOTICE AND PROOF OF SERVICE

To: Honorable William K. Suter
Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

Corey Hill
Register No. 22609-424
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

Michael O. Lang
Assistant United States Attorney
219 S. Dearborn, 5th Floor
Chicago, IL 60604

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001

Please take notice that I have mailed the original and ten copies of the Petition for Writ of Certiorari to the Clerk of the above court and that I am serving the United States Attorney, the Solicitor General and Petitioner with one copy each of the Petition by depositing the copies in the mail in Tinley Park, Illinois, in envelopes with sufficient prepaid postage and addressed as indicated above on this 2nd day of August, 2011.

STEPHEN E. EBERHARDT
Counsel of Record

No: ___________

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

COREY HILL, Petitioner

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Michael O. Lang
Assistant United States Attorney
219 S. Dearborn, 5th Floor
Chicago, IL 60604

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue
Washington, D.C. 20530-0001

Please take notice that I have mailed the original and a copy of this Motion to the Clerk of the above court and that I am serving the United States Attorney, the Solicitor General, and Petitioner with one copy by depositing the copies in the mail in Tinley Park, Illinois, in envelopes with sufficient prepaid postage and addressed as indicated above on this 2nd day of August, 2011.

Stephen E. Eberhardt

STEPHEN E. EBERHARDT
Counsel of Record

RESPONDENT'S BRIEF

Supreme Court, U.S.
FILED
OCT - 7 2011
OFFICE OF THE CLERK

ORIGINAL

No. 11-5721

IN THE SUPREME COURT OF THE UNITED STATES

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

DONALD B. VERRILLI, JR.
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Counsel of Record

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RECEIVED
OCT - 7 2011
OFFICE OF THE CLERK
SUPREME COURT, U.S.

QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in an initial sentencing proceeding that takes place on or after the statute's effective date if the offense occurred before that date.

IN THE SUPREME COURT OF THE UNITED STATES

No. 11-5721

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the Federal Reporter but is available at 417 Fed. Appx. 560.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2011. The petition for a writ of certiorari was filed on July 1, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of distributing 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Presentence Investigation Report (PSR) 3. He was sentenced to ten years of imprisonment, to be followed by ten years of supervised release. Pet. App. C23-C24. The court of appeals affirmed. Id. at A1-A2.

1. On March 28, 2007, a confidential informant working with the Bureau of Alcohol, Tobacco, Firearms and Explosives arranged by telephone to purchase two ounces of crack cocaine (a type of cocaine base) from petitioner. PSR 4. Later that day, petitioner arrived at the informant's home and sold approximately 53.3 grams of crack cocaine for $1300. Ibid. Several months later, federal agents arrested petitioner, and a grand jury in the Northern District of Illinois returned a one-count indictment charging him with distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Id. at 3. On April 22, 2009, a jury convicted petitioner on that count. Ibid.

2. On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010 (FSA or Act), Pub. L. No. 111-220, 124 Stat. 2372, the stated purpose of which was "[t]o restore fairness to Federal cocaine sentencing." The Act, among other things, lowered the penalties for certain cocaine-base offenses by increasing the

threshold quantities of cocaine base that trigger certain mandatory-minimum sentences. Under pre-FSA law, a defendant would be subject to a statutory mandatory-minimum sentence of five years of imprisonment (ten years if he had a prior felony drug conviction) for distributing either five grams of cocaine base or 500 grams of powder cocaine, and would be subject to a ten-year mandatory-minimum sentence (20 years if he had a prior felony drug conviction) for distributing either 50 grams of cocaine base or 5000 grams of powder cocaine. See 21 U.S.C. 841(b)(1)(A), (1)(A)(ii)-(iii), (1)(B) and (1)(B)(ii)-(iii) (2006). The FSA increased the amount of cocaine base that triggers the five-year mandatory minimum from five grams to 28 grams and increased the amount of cocaine base that triggers the ten-year mandatory minimum from 50 grams to 280 grams. FSA § 2(a), 124 Stat. 2372. By increasing those thresholds, the FSA reduced the ratio between corresponding threshold quantities of powder cocaine and cocaine base from 100:1 to approximately 18:1. On October 27, 2010, pursuant to special emergency authority conferred in the Act (§ 8, 124 Stat. 2374), the United States Sentencing Commission promulgated amendments to the federal Sentencing Guidelines designed to implement the FSA, which became effective four days later (November 1, 2010). U.S. Sentencing Comm'n, Sentencing Guidelines for United States Courts, 75 Fed. Reg. 66,188 (2010) (FSA Emergency Amendments).

3. On December 2, 2010, following both the passage of the FSA and the effective date of the emergency Guidelines amendments, the district court held a sentencing hearing for petitioner. Pet. App. C. The court stated that, in the absence of an applicable mandatory minimum, consideration of the sentencing factors set forth in 18 U.S.C. 3553(a) -- including the revised Sentencing Guidelines -- would lead it to impose a 51-month prison sentence. Pet. App. C14. The court recognized, however, that the amount of crack involved in petitioner's offense (53.3 grams) subjected him to a statutory mandatory minimum. Ibid. Under the law in effect at the time of his offense, the mandatory minimum would be ten years of imprisonment. 21 U.S.C. 841(b)(1)(A)(iii) (2006) (ten-year mandatory minimum for offense involving 50 grams or more of cocaine base). Under the FSA, however, the mandatory minimum would be only five years. FSA § 2(a), 124 Stat. 2372 (five-year mandatory minimum for offense involving between 28 and 280 grams of cocaine base).

Petitioner argued that, because the sentencing was taking place after the FSA's effective date, the FSA's five-year mandatory minimum should apply. Pet. App. C4-C14. The district court rejected that argument. Id. at C13-C14. Although the court indicated that it might have agreed with petitioner's argument had the issue been a matter of first impression, it concluded that circuit precedent precluded application of the FSA to defendants whose offense conduct occurred before the Act's enactment. Id. at C13. It therefore applied the pre-FSA mandatory minimum and imposed a ten-year sentence. Id. at C14, C23.

4. Petitioner's only argument on appeal was that the FSA "should apply to every defendant sentenced after its enactment, even if the underlying crime was committed before." Pet. App. A2. The government opposed that position, arguing that the FSA should not apply to defendants whose crimes predated its enactment. Gov't C.A. Br. 6-15.

The court of appeals affirmed petitioner's sentence. Pet. App. A1-A2. It stated that petitioner's argument was foreclosed by its decision in United States v. Fisher, 635 F.3d 336 (7th Cir.), petitions for cert. pending Nos. 11-5683 (filed Aug. 1, 2011) and 11-6096 (filed Aug. 23, 2011), which held that the FSA applies only to offenses committed after the Act's enactment. Pet. App. A2.

5. On July 15, 2011, two weeks after the petition for a writ of certiorari was filed in this case, the Attorney General sent a memorandum to all federal prosecutors about the application of the FSA. App., infra, 1a-2a. The memorandum noted that, "[i]mmediately following the enactment of the Fair Sentencing Act, the Department [had] advised federal prosecutors that the new penalties would apply prospectively only to offense conduct occurring on or after the enactment date." Id. at 1a (emphasis omitted). It observed, however, that "[m]any courts have now

considered the temporal scope of the Act and have reached varying conclusions." Ibid. In particular, some courts, "reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date." Ibid.

The "differing court decisions," in combination with "the serious impact on the criminal justice system of continuing to impose unfair penalties," caused the Attorney General to review the government's position "regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment." App., infra, 2a. That review led the Attorney General to "agree with those courts that have held that Congress intended the Act not only to 'restore fairness in federal cocaine sentencing policy' but to do so as expeditiously as possible and to [apply to] all defendants sentenced on or after the enactment date." Ibid. (quoting 124 Stat. 2372). "As a result," he concluded, "the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place." Ibid. He accordingly directed all federal prosecutors to "act consistently with these legal principles." Ibid.

Although the Attorney General's memorandum was issued after the opportunity for further review by the court of appeals in petitioner's case had passed, the government promptly informed the court of appeals (as well as other courts) of its revised position in other cases that were still pending. United States v. Holcomb, No. 11-1558, 2011 WL 3795170, at *1 (7th Cir. Aug. 24, 2011) (opinion of Easterbrook, C.J.); see United States v. Dixon, 648 F.3d 195, 198 n.2 (3d Cir. 2011); U.S. Pet. at 1, United States v. Sidney, 648 F.3d 904 (8th Cir. 2011) (No. 11-1216). The ten active judges on the court of appeals, in a split 5-5 vote, refused to reconsider the issue en banc. Holcomb, 2011 WL 3795170, at *1.

DISCUSSION

Petitioner contends (Pet. 7-17) that this Court's intervention is necessary to resolve a conflict in the circuits about the applicability of the FSA's revised statutory penalties to preenactment offenders. The government agrees. The court of appeals incorrectly concluded that defendants who committed their offenses before the FSA are still subject, in post-FSA sentencings, to heightened statutory penalties that Congress has repudiated as fundamentally unsound. Although that conclusion accords with the Eighth Circuit's, it conflicts with the holdings of the First and Third Circuits. The Seventh and Eighth Circuits have cemented the circuit conflict by denying en banc review to consider adopting the government's position.

Contrary to the Seventh and Eighth Circuit's positions, both the text and the purpose of the FSA demonstrate Congress's intent that the Act apply immediately at all initial sentencing proceedings. The issue, which will potentially affect the sentences of thousands of current and future federal defendants, is squarely presented in this case. This Court should accordingly grant certiorari and reverse the court of appeals' judgment.[1]

1. a. In 1986, Congress adopted a 100:1 ratio between the quantities of powder cocaine and cocaine base required to trigger certain mandatory-minimum sentences. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 to -3. "Congress apparently believed that crack was significantly more dangerous than powder cocaine" because it was more addictive, associated with more violence, more harmful to users, more prevalent among teenagers, and increasingly more popular due to its high potency and low cost. Kimbrough v. United States, 552 U.S. 85, 95-96 (2007). Shortly after the 100:1 ratio went into effect, however, the Sentencing Commission and others began to question those beliefs. See United States v. Santana, 761 F. Supp. 2d 131, 135-136 (S.D.N.Y. 2011) (collecting authorities).

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[1] The question presented in this case is also presented in several other petitions currently on the Court's docket, including Hernandez v. United States, petition for cert. pending, No. 11-6602 (filed Sept. 21, 2011); Lewis v. United States, petition for cert. pending, No. 11-6464 (filed Sept. 13, 2011); Hyde v. United States, petition for cert. pending, No. 11-6364 (filed Sept. 9, 2011); Robinson v. United States, petition for cert. pending, No. 11-5842 (filed Aug. 11, 2011); Dorsey v. United States, petition for cert. pending, No. 11-5683 (filed Aug. 1, 2011).

In particular, the Sentencing Commission challenged the view that crack is considerably more harmful than powder cocaine, concluding that "crack is associated with 'significantly less trafficking-related violence . . . than previously assumed'"; that the two drugs have identical "'negative effects'" in at least some circumstances; and that "'the epidemic of crack cocaine use by youth never materialized to the extent feared.'" Kimbrough, 552 U.S. at 97-98 (quoting U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 94, 96, 100 (2002) (2002 Report)). The Commission also observed that the 100:1 ratio had the undesired effect of punishing major traffickers (who typically deal in powder cocaine) more lightly than street-level dealers (who often convert that powder cocaine to crack). Id. at 98 (citing U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 66-67, 174 (1995)). And the Commission further observed that, because most defendants convicted of offenses involving crack cocaine are African-American, the 100:1 ratio "'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race.'" Ibid. (quoting 2002 Report 103).

b. Congress ultimately responded to those concerns by enacting the FSA, in order "[t]o restore fairness to Federal cocaine sentencing." 124 Stat. 2372. The legislative history demonstrates broad agreement that a 100:1 ratio was unjustified. See, e.g., 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (Sen. Durbin) ("There is a bipartisan consensus that current cocaine sentencing laws are unjust."). The Act accordingly replaced the 100:1 ratio with a ratio of roughly 18:1. FSA § 2(a), 124 Stat 2372. At the same time, it also (among other things) instructed the Sentencing Commission to increase the recommended Guidelines sentences for certain types of especially harmful drug trafficking offenses, such as offenses involving violence. FSA §§ 5-6, 124 Stat. 2373-2374.

The Act directed the Commission to act promptly in issuing the Guidelines amendments "provided for in this Act," along with "such conforming amendments * * * as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." FSA § 8, 124 Stat. 2374. The Commission was required to promulgate the amendments "as soon as practicable, and in any event not later than 90 days after the enactment of this Act." FSA § 8(1), 124 Stat. 2374. The Act further provided that the amendments would take effect immediately upon their promulgation, dispensing with the 180-day congressional-review period typically required (under 28 U.S.C. 994(p)) before Guidelines amendments become effective. FSA § 8(1) (granting Commission the authority described in "section 21(a) of the Sentencing Act of 1987"); see Sentencing Act of 1987, Pub. L. No.

100-182, § 21, 101 Stat. 1271 (authorizing "a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress").

The Commission complied with Congress's directive by issuing temporary emergency guidelines amendments that became effective on November 1, 2010. FSA Emergency Amendments, 75 Fed. Reg. at 66,188.[2] Among other things, the emergency amendments adjusted the Drug Quantity Table in Sentencing Guidelines § 2D1.1(c), which specifies the base offense levels for drug-trafficking offenses involving particular amounts of drugs. Id. at 66,189, 66,191. In order to conform the Drug Quantity Table to the FSA, the amendments adjusted the base offense levels for crack-cocaine offenses to reflect the same 18:1 ratio that the FSA had adopted for statutory mandatory minimums. Ibid. Pursuant to 18 U.S.C. 3553(a)(4)(ii), which requires a district court initially sentencing a defendant to consider the guidelines that "are in effect on the date the defendant is sentenced," these amendments immediately applied to defendants sentenced on or after the amendments' effective date.

2. a. The court of appeals' decision in this case refused to apply the FSA's mandatory-minimum penalty scheme to a preenactment offender who was sentenced after both the FSA and its

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[2] The Commission has since promulgated similar amendments that are scheduled to become effective on a permanent basis on November 1, 2011. U.S. Sentencing Comm'n, Sentencing Guidelines for United States Courts, 76 Fed. Reg. 24,960 (2011).

implementing guidelines amendments became effective. That holding conflicts with the decisions of two other circuits.

The Third Circuit has held that the FSA applies to all defendants sentenced on or after the statute's effective date. United States v. Dixon, 648 F.3d 195, 203 (2011). The court reasoned that "Congress's emergency directive to the Sentencing Commission * * * to 'make such conforming amendments' that would 'achieve consistency with other guideline provisions and applicable law' demonstrates that Congress wanted the mandatory minimums in the FSA to apply to sentences handed down as of its effective date." Id. at 200 (quoting FSA § 8(2), 124 Stat. 1274). The court noted that, because "the statute of limitations for drug offenses is five years," many offenders sentenced after the FSA's effective date will have committed their crimes before that date. Id. at 202. If those preenactment offenders are subject to pre-FSA mandatory minimums implementing a 100:1 ratio, the court observed, the pre-FSA mandatory minimums "would always trump the new Guidelines [which implement an 18:1 ratio] for the large number of defendants whose Guidelines ranges are below the mandatory minimum." Id. at 201. The court concluded that "Congress could not have intended such a bizarre outcome," which would "eviscerate[] the very consistency and conformity that the statute requires." Id. at 201-202.[3]

The First Circuit has held that the FSA applies at least in all sentencings occurring after November 1, 2010, the effective date of the Sentencing Commission's emergency guideline amendments. United States v. Douglas, 644 F.3d 39, 42-44 (2011). "It seems unrealistic," the court reasoned, "to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums." Id. at 44. The court explained that "the imposition now of a minimum sentence that Congress has already condemned as too harsh makes this an unusual case." Ibid.

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[3] In United States v. Vera Rojas, 645 F.3d 1234, 1240 (11th Cir. 2011) (per curiam), a panel of the Eleventh Circuit reached a similar conclusion, reasoning that "[b]y granting the Sentencing Commission the emergency authority to amend the Sentencing Guidelines by November 1, 2010, Congress necessarily indicated its intent for the FSA to apply immediately." Id. at 1239. The court explained that "[t]o ask district courts to consider the date the offense was committed to determine the statutory minimum, but the date of sentencing to determine the guidelines range, would lead to an incongruous result that is inconsistent with Congressional intent," "would run afoul of the policies motivating [the Act's] enactment," would "render ineffectual Congress's express directive to the Sentencing Commission," and "would achieve absurd results." Ibid. On October 4, 2011, the Eleventh Circuit granted rehearing en banc in Vera Rojas (and vacated the panel opinion). 2011 WL 4550170. The Eleventh Circuit also granted rehearing en banc in United States v. Hudson, 426 Fed. Appx. 748 (2011) (per curiam), reh'g granted, 2011 WL 4552115 (Oct. 4, 2011), in which a panel had refused to apply the FSA to a defendant whose offense was committed, and who was originally sentenced, before August 3, 2010, but who was rensentenced after August 3, 2010, following the grant of relief under 28 U.S.C. 2255.

b. In contrast, the Seventh and Eighth Circuits have concluded that the FSA applies only to postenactment offenders. United States v. Sidney, 648 F.3d 904, 910 (8th Cir. 2011); United States v. Fisher, 635 F.3d 336 (7th Cir.), petitions for cert. pending Nos. 11-5683 (filed Aug. 1, 2011) and 11-6096 (filed Aug. 23, 2011). Both courts have focused on the federal "savings statute," 1 U.S.C. 109, which generally requires courts to impose the penalties in place at the time of the offense, rather than those in place at the time of sentencing. Sidney, 648 F.3d at 906; Fisher, 635 U.S. at 338. Although the First and Third Circuits have found the savings statute to be superseded in these circumstances by specific congressional intent that the FSA's penalty scheme take effect immediately, the Seventh and Eighth Circuits have reached the contrary conclusion. Compare Dixon, 648 F.3d at 200-203; Douglas, 644 F.3d at 44, with Sidney, 648 F.3d at 907-908; Fisher, 635 F.3d at 338.

The Seventh and Eighth Circuits initially decided this issue without the benefit of the government's current position. The government has since informed both circuits of that position. See p. 7, supra. Both circuits have nevertheless denied en banc review. United States v. Sidney, No. 11-1216, Docket entry (8th Cir. Oct. 6, 2011); United States v. Holcomb, No. 11-1558, 2011 WL

3795170, at *1 (7th Cir. Aug. 24, 2011) ("A majority of the active judges did not vote in favor of rehearing en banc, and the proposal therefore fails. Petitions for rehearing or rehearing en banc will not be accepted; this decision is the court's final judgment.").

As previously mentioned (see p. 7, supra) the Seventh Circuit's denial of en banc review was the result of an evenly divided 5-5 vote. Holcomb, 2011 WL 3795170, at *1. The five judges who voted against rehearing en banc believed the circuit's rule to be correct. Id. at *1-*8 (opinion of Easterbrook, C.J.). The other half of the active circuit judges -- including the two who were on the panel that originally decided the issue -- concluded that the circuit's rule "is wrong." Id. at *8 (Williams, J., dissenting from denial of rehearing en banc); see id. at *9. They explained that applying pre-FSA mandatory minimums at post-FSA sentencings "would 'undercut the bill's primary objective,' 'result in sentencing anomalies Congress surely did not intend,' benefit the 'worst offenders,' give 'rise to oddities,' and 'not necessarily promote more equitable outcomes.'" Id. at *16 (quoting Abbott v. United States, 131 S. Ct. 18, 27-28 (2010)) (ellipses omitted).

Judge Posner separately addressed the "absurd," "perverse," and "gratuitously silly" results of applying the court of appeals' rule. Holcomb, 2011 WL 3795170, at *17-*19 (Posner, J., dissenting from denial of rehearing en banc). He explained that unless the

FSA's mandatory minimums apply to preenactment offenders sentenced after its passage, such offenders "will receive sentences in excess of the sentencing guidelines that Congress -- in directing the Sentencing Commission to make haste to conform them to the new, more lenient statutory minimums (more lenient because of the enhanced quantity thresholds) -- intended would apply to such defendants." Id. at *18. His opinion includes charts illustrating, for example, that the pre-FSA mandatory minimum imposed on one Seventh Circuit defendant (ten years) exceeded the lower end of his post-FSA guidelines range (30 months) by 300% and the upper end of that range (37 months) by 224%. Ibid.

3. As Judge Posner and the other dissenters recognized, the rule that the court of appeals applied in this case is incorrect. Congress's controlling intent is that the FSA apply in every sentencing proceeding on or after the date of its enactment (August 3, 2010), regardless of when the underlying offense occurred.[4]

a. The general federal savings statute, 1 U.S.C. 109, provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Congress enacted the original version of the savings statute in 1871, in response to the common-law presumption that the repeal of a criminal statute abated all prosecutions that had not yet become final on appeal. Warden v. Marrero, 417 U.S. 653, 660 (1974). The savings statute reverses that presumption, so that now a defendant is generally subject to both the substantive criminal laws and the criminal sentencing laws in effect at the time of his offense, regardless of any later changes. United States v. Reisinger, 128 U.S. 398, 402-403 (1888) (holding that the savings statute allowed a defendant's prosecution under an indictment returned after the repeal of the criminal law under which he was charged); Marrero, 417 U.S. at 661 (explaining that "the saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense").

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[4] As every court of appeals to have addressed the question has agreed, however, the FSA's modified mandatory-minimum sentences do not apply to defendants who were sentenced before its passage. See, e.g., United States v. Baptist, 646 F.3d 1225, 1229 (9th Cir. 2011) (per curiam) ("Like every other circuit court to have considered this question, we can find no evidence that Congress intended the Fair Sentencing Act to apply to defendants who had been sentenced prior to the August 3, 2010 date of the Act's enactment.").

The savings statute does not control, however, when it contradicts the clear intent of Congress that a specific law eliminating a criminal offense or lowering a criminal sentence take immediate effect. Although the text of Section 109 could be read as requiring Congress to provide a clear textual statement of its intent to supersede a sentence in effect at the time of a defendant's offense, such a construction would conflict with the longstanding rule that "one legislature cannot abridge the powers of a succeeding legislature." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810). This Court has often recognized "that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute" and has refused to require "'magical passwords in order to effectuate an exemption'" from a statute setting forth a general rule. Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (quoting Marcello v. Bonds, 349 U.S. 302, 310 (1955)).

The Court has accordingly held that the general savings statute "cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment." Great N. R. Co. v. United States, 208 U.S. 452, 465 (1908) (emphasis added). The Court has explained that "if possible, * * * effect [should] be given to all the parts of a law"; that a later enactment is part of "the law as a whole"; and that the savings statute should not be applied if "the legislative mind will be set at naught" by doing so. Ibid. Thus, if a subsequent act "necessarily, or by clear implication, conflicts with the general [savings statute], the latest expression of the legislative will must prevail." Hertz v. Woodman, 218 U.S. 205, 218 (1910).

b. The "necessary implication" of the FSA is that Congress intended the revised mandatory-minimum penalties for cocaine-base offenses to apply in all initial sentencings conducted after the Act's effective date. Congress manifested that intent most clearly by requiring the Sentencing Commission to promulgate immediately-effective implementing amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act." FSA § 8(1), 124 Stat. 2374.

The Commission's charge to immediately implement "conforming amendments" necessary "to achieve consistency with * * * applicable law," FSA § 8(2), 124 Stat. 2374, included the task of harmonizing the Drug Quantity Table in the Sentencing Guidelines with the 18:1 ratio in the FSA. The term "applicable law" necessarily referred to the sentencing statutes as amended by the FSA, since any preexisting law would already have been addressed by the Commission and would not have required any new "conforming amendments." And in order to "achieve consistency with" that post-FSA law, the Commission would need to "ensure[] that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses for other drugs," as modified by the FSA, was "consistently and proportionally reflected throughout the Drug Quantity Table." FSA Emergency Amendments, 75 Fed. Reg. at 66,191; see also Dixon, 648 F.3d at 200 ("'Applicable law' must be the FSA, not the 1986 Act, because

Congress sought to bring the Guidelines in conformity with the 18:1 ratio in the FSA.").

Congress's mandate that the Commission promptly issue immediately effective amendments to implement an 18:1 ratio in the Drug Quantity Table necessarily reflects an intent that the FSA's 18:1 ratio for mandatory minimums apply immediately. Congress understood that district courts would be required to apply the new guidelines at initial sentencings that occurred after their issuance. See 18 U.S.C. 3553(a)(4)(ii). And nearly all defendants sentenced in the initial months after the FSA's enactment would be preenactment offenders.[5] Subjecting those preenactment offenders to pre-FSA mandatory minimums, which are premised on a 100:1 ratio, would subvert Congress's intent to apply an 18:1 ratio under the Sentencing Guidelines. See, e.g., Holcomb, 2011 WL 3795170, at *12 (Williams, J., dissenting from denial of rehearing en banc) ("It makes no sense for Congress to will that guidelines based on an 18:1 ratio take effect immediately in sentencings even for crimes committed before the Act if those same defendants would be subject to pre-FSA 100:1 mandatory minimums.").

---

[5] For several reasons, a lengthy delay typically ensues between commission of an offense and the sentencing for that offense. See, e.g., Dixon, 648 F.3d at 202. First, there is often a delay between the offense and the arrest. Petitioner here, for example, committed his offense over 14 months before he was arrested, see PSR 3-4, and the five-year statute of limitations, 18 U.S.C. 3282(a), would permit much longer delays. Next, there can be a delay between arrest and indictment, as the Speedy Trial Act allows the government to bring charges at any time up to 30 days after the arrest. 18 U.S.C. 3161(b). Finally, the median time between indictment and sentencing for federal drug offenses (other than marijuana offenses) is more than 11 months. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 272, tbl. D-10 (2010).

Under Sentencing Guidelines § 5G1.1(b), "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." As Judge Posner's charts demonstrate, the old mandatory minimums would frequently overwhelm the new Guidelines sentences, rendering them irrelevant. Holcomb, 2011 WL 3795170, at *18 (Posner, J., dissenting from denial of rehearing en banc). Thus, "Congress's 'emergency' directive is unnecessary if it did not intend to apply the FSA immediately because the old mandatory minimums would still control in many cases." Dixon, 648 F.3d at 201.

Many situations illustrate the gross incongruity that would result if the new emergency Guidelines had to coexist with the pre-FSA mandatory minimums. For example, for a defendant convicted of an offense involving five grams of cocaine base, the new Guidelines would recommend a sentence of 24-30 months (assuming a criminal history category II and no other aggravating or mitigating factors), but the pre-FSA statutory scheme would require a mandatory-minimum sentence of five years -- 100% to 150% higher. Holcomb, 2011 WL 3795170, at *18 (Posner, J., dissenting from denial of rehearing en banc). The same defendant, if convicted of an offense involving 50 or 100 grams of cocaine base, would have a recommended Guidelines sentence of 70-87 months, but the pre-FSA mandatory minimum would be ten years -- 38% to 71% higher. Ibid.

Congress could not have intended for its directive to the Sentencing Commission -- to promptly "make such conforming amendments" that would "achieve consistency with * * * applicable law," FSA § 8(2), 124 Stat. 2374 (emphasis added) -- to result in such incongruities. "Using a pre-FSA 100:1 minimum coupled with an 18:1 guideline to decide a sentence does not 'achieve consistency.' It achieves the opposite." Holcomb, 2011 WL 3795170, at *13 (Williams, J., dissenting from denial of rehearing en banc); see also Dixon, 648 F.3d at 201 ("Refusing to apply the mandatory minimums in the FSA eviscerates the very consistency and conformity that the statute requires."); Douglas, 644 F.3d at 44 ("It seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines into effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums."). The urgency of Congress's directive to the Sentencing Commission -- which not only required amendments effective in 90 days, but encouraged and allowed them even sooner -- accordingly produces a "necessary implication" that Congress intended the FSA's new mandatory-minimum thresholds to apply immediately.

c. That necessary implication finds further support in additional features of the Act. To begin with, the stated purpose of the Act -- "[t]o restore fairness to Federal cocaine sentencing," 124 Stat. 2372 -- militates in favor of immediate application. The Act reflects Congress's judgment that "the 100:1 ratio * * * was unsound and unduly harsh." *Douglas*, 644 F.3d at 43. Continuing to apply that ratio at initial sentencings after the Act's passage -- potentially for another five years, until the statute of limitations had run on all pre-FSA offenses, see 18 U.S.C. 3282(a) -- would perpetuate the very unfairness that Congress had repudiated, including the perceived racial disparities in sentencing. See, *e.g.*, 156 Cong. Rec. at S1683 (Sen. Leahy) ("These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under law.").

Congress would not have intended that result. See, *e.g.*, *Holcomb*, 2011 WL 3795170, at *13 (Williams, J., dissenting from denial of rehearing en banc) ("[W]hy would Congress want sentencing judges to *continue* to impose sentences that it had already declared to be unfair?"); *Dixon*, 648 F.3d at 202 ("In plainly seeking to 'restore fairness' to sentencing, Congress intended to apply the Act to all sentences rendered as of the Act's passage."); *Douglas*, 644 F.3d at 44 ("[T]he imposition *now* of a minimum sentence that Congress has *already* condemned as too harsh makes this an unusual case."). No practical or administrative concerns existed that would counsel in favor of delay. See Douglas, 644 F.3d at 43-44. Indeed, for reasons already discussed, it produces a far more coherent scheme -- in which the new Guidelines and statutory minimums work together, rather than at cross-purposes -- for the revised statutory penalties, like the revised Guidelines penalties, to take effect immediately.

Section 10 of the Act provides still more evidence that Congress intended immediate application. That section directs the Sentencing Commission, "[n]ot later than 5 years after the date of enactment of this Act," to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act." FSA § 10, 124 Stat. 2375. If, during those five years, pre-FSA law were to continue to apply to the large class of preenactment offenders (as to whom the statute of limitations would not yet have run), then "during the time period in which the Sentencing Commission is supposed to produce a report on the effects of the FSA, the Act often [would] be inapplicable." Dixon, 648 F.3d at 202. That "anomaly" would "frustrate[] the ability of the Sentencing Commission to compile" the report that Congress wanted. Ibid. (suggesting that, as a result, the report "would be incomplete, at best, and incomprehensible, at worst") (internal quotation marks omitted);

see also Holcomb, 2011 WL 3795170, at *13 (Williams, J., dissenting from denial of rehearing en banc).

Congress did not enact a statute at war with itself. Congress would not intend that the Guidelines immediately implement an 18:1 ratio, but often be superseded by mandatory minimums applying a 100:1 ratio; that "fairness" be "restore[d]" to sentencing, but that courts continue to impose the precise sentences it had deemed unfair; and that the Sentencing Commission study the FSA's effect on offenders as to whom the Act would not actually apply. The "necessary implication," therefore, is that Congress intended the Act's revised penalty scheme to apply immediately.

4. The question of the FSA's applicability at the initial sentencings of preenactment offenders has considerable national importance and warrants this Court's review. Since 1996, federal courts have sentenced approximately 4000 to 6000 crack offenders each year. See Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong., 1st Sess. 49, fig.1 (2009) (statement of Hon. Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm'n). As previously mentioned, the statute of limitations for the relevant offenses is five years, 18 U.S.C. 3282(a), so courts will continue to sentence pre-FSA offenders for several years to come. Thousands of offenders will thus at least potentially be affected

by the question presented. Holcomb, 2011 WL 3795170, at *8 (Williams, J., dissenting from denial of rehearing en banc) ("This issue affects pending cases and many cases to come in light of the five-year statute of limitations on drug prosecutions."). In each of those cases, application of the FSA may have a profound effect on the sentence. As previously discussed, applying pre-FSA mandatory minimums can more than double the sentence that the defendant might otherwise have received. See pp. 16, 21-22, supra. It is untenable for sentences to vary that widely depending on the circuit where a defendant is charged and sentenced.

This case squarely presents the issue and therefore provides a good vehicle for resolving the circuit conflict. Petitioner committed his offense on March 28, 2007, well before the FSA's enactment, and was sentenced on December 2, 2010, after the effective dates of both the FSA and the conforming amendments to the Sentencing Guidelines. PSR 4; Pet. App. C1. The amount of cocaine base involved in his offense (53.3 grams) would subject him to a ten-year mandatory-minimum sentence under pre-FSA law, but only a five-year mandatory-minimum sentence under the FSA. PSR 4; compare 21 U.S.C. 841(b)(1)(A)(iii) (2006), with FSA § 2, 124 Stat. 2372. The issue of the FSA's application was raised in the district court and preserved on appeal. Pet. App. A2, B4-B5. The district court expressly stated that it would have given petitioner a five-year sentence, rather than a ten-year sentence, had the FSA applied. Id. at B14. The question presented is therefore outcome-determinative in this case, and its resolution will provide needed clarity for the sentencing of thousands of similarly situated offenders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General

LANNY A. BREUER
Assistant Attorney General

JOSHUA S. JOHNSON
Attorney

OCTOBER 2011

APPENDIX

Office of the Attorney General
Washington, D.C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr.
Attorney General

SUBJECT: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States* v. *Douglas*, No.10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to "restore fairness in federal cocaine sentencing policy" but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act's central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law. That is what I direct you to undertake today.

REPLY
BRIEF

ORIGINAL

Supreme Court, U.S.
FILED
NOV 10 2011
OFFICE OF THE CLERK

No: 11-5721

IN THE SUPREME COURT OF THE UNITED STATES

COREY HILL, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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[illegible]
NOV 15 2011
OFFICE OF THE CLERK
SUPREME COURT, U.S.

AMENDED QUESTION PRESENTED FOR REVIEW

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in an initial sentencing proceeding that takes place on or after the statute's effective date if the offense occurred before that date?

No: 11-5721

IN THE SUPREME COURT OF THE UNITED STATES

COREY HILL, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

On October 7, 2011, the Solicitor General filed a Brief noting agreement with the Petitioner's contention "that this Court's intervention is necessary to resolve a conflict in the circuits about the applicability of the FSA's revised statutory penalties to preenactment offenders." (Brief of United States at page 7). Further, the United States noted that "[t]his case squarely presents the issue and therefore provides a good vehicle for resolving the circuit conflict" and specifically detailed the reasoning behind that statement. (Brief of the United States at pages 26-27).

In reply to the Brief of the United States in *Dorsey v. United States*, 11-5683, Mr.

Dorsey argues that his case is a better vehicle for resolution of the issue now before the Court.

One of *Dorsey's* main points is that *Hill* was sentenced after the effective date of the Guideline amendments. This argument fails to acknowledge the issue as framed by the Solicitor General in the Brief of the Unites States herein. Moreover, to suggest that this Court would not or could not properly decide the issues because Mr. Hill was sentenced after November 1, 2010 is unwarranted. (*Dorsey* Reply Brief at 4). The bottom line issue for resolution in these cases is the applicability of the FSA to those persons sentenced after its effective date. The real relevance of the mandate to amend the Guidelines is whether or not that mandate expressly or by implication sheds light on the intent of Congress. And, to presuppose that this Court would not resolve the issue as to those persons sentenced between August 3, 2010 and November 1, 2010 is, again, unwarranted.

Just as it is unwarranted for *Dorsey* to underestimate the ability of this Court to resolve the bottom line issue raised herein, *Dorsey's* implication that Federal Defender panel attorneys are not committed to zealous and effective representation of their clients is unwarranted. (*Dorsey* reply Brief at 6-7). Undersigned counsel, as a Federal Defender panel attorney in the Northern District of Illinois, has been committed to Mr. Hill as well as all other clients who have raised similar issues in the District and Circuit Courts and that will be raised in petitions for *certiorari* in the near future.

Finally, while pointing out docketing dates to the Court, Mr. Dorsey fails to note that

Mr. Hill's Petition was filed on July 1, 2011 and Mr. Dorsey's Petition filed on August 1, 2011. The Solicitor General reviewed and evaluated Mr. Hill's as well as Mr. Dorsey's petition (*Dorsey* Reply Brief at 7) and, in their reasoned judgment, have concluded that this Petition raises the issue properly before this Court and provides a proper vehicle for resolution of the ultimate issue of whether or not the FSA should apply to all petitioners sentenced after the effective date of the Act. Mr. Hill also respectfully disagrees that there is any "better" vehicle for resolution of this important issue.

CONCLUSION

For these reasons and the reasons noted in the Petition for Writ of Certiorari, Petitioner prays this Honorable Court grant the Writ of Certiorari, reverse the decision of the Seventh Circuit Court of Appeals and Order the District Court to sentence Petitioner pursuant to the provisions of the Fair Sentencing Act of 2010.

Respectfully submitted,

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JOINT APPENDIX

No. 11-5721

In The
Supreme Court of the United States

◆

COREY A. HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

JOINT APPENDIX

◆

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Petition For Writ Of Certiorari Filed July 1, 2011
Certiorari Granted November 28, 2011

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TABLE OF CONTENTS

Page

Relevant Docket Entries 1

Indictment 6

Transcript of Sentencing Proceedings of June 30, 2010 7

District Court Order of June 30, 2010 49

District Court Order in *United States v. Rollins* 51

Transcript of Sentencing Proceedings of December 2, 2010 56

Judgment and Commitment 83

Denial of Defendant's Motion to Reconsider 95

Seventh Circuit Order of April 7, 2011 97

Order Granting IFP and Certiorari 100

RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

Date Filed	#	Docket Text
06/19/2008	1	Complaint as to Corey A. Hill filed.
07/17/2008	7	Indictment as to Corey A. Hill filed.
04/22/2009	63	Minute entry before the Honorable John W. Darrah as to Corey A. Hill: Trial ends – jury. Jury returns a verdict of guilty as to count one of the indictment. The jury finds that the amount and form of controlled substance that the defendant distributed has been proven beyond a reasonable doubt is: 50 grams or more of mixtures containing cocaine base, in the form of crack cocaine. Judgment of guilty entered on the verdict. Sentencing set for 8/19/09 at 10:00 a.m. Cause is referred to the probation office for a presentence investigation report.
04/22/2009	64	Jury verdict as to Corey A. Hill. Guilty on Count 1.
04/25/2009	61	Motion by Corey A. Hill for judgment of acquittal filed.
04/28/2009	65	Response by USA to Motion by Corey A. Hill for judgment of acquittal filed.

05/05/2009	67	Minute entry before the Honorable John W. Darrah. Defendant's Motion for judgment of acquittal or, in the alternative, Motion for new trial is denied.
09/06/2009	73	Sentencing Memorandum as to Corey A. Hill filed.
09/08/2009	74	Position Paper by USA as to Corey A. Hill filed.
12/15/2009	80	Supplement by Corey A. Hill to Sentencing Memorandum filed.
01/08/2010	81	Supplement by USA to Position Paper by USA filed.
06/30/2010	88	Minute entry before the Honorable John W. Darrah as to Corey A. Hill: Sentencing hearing held and continued to 9/2/10 at 1:00 p.m.
06/30/2010	89	Minute entry before the Honorable John W. Darrah as to Corey A. Hill: For the reasons stated below, the Court will apply a 1:1 crack-to-powder cocaine ratio for purposes of determining Defendant Corey A. Hill's sentence. (For Further Details See Minute Order).
10/25/2010	93	Supplement by Corey A. Hill to Sentencing Memorandum filed.
10/29/2010	97	Second Supplement by USA to Position Paper by USA filed.

12/02/2010	101	Judgment (Sentencing Order) as to Corey A. Hill. The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of One Hundred and Twenty (120) months on count one of the indictment. The defendant is remanded to the custody of the United States Marshal. Upon release from imprisonment, the defendant shall be on supervised release for a term of Ten (10) Years on count one of the indictment. Additional Supervised Release Terms. Criminal Monetary Penalties. Schedule of Payments., Attorney Richard Joseph Cosentino and Stephen E. Eberhardt terminated. Signed by the Honorable John W. Darrah on 12/7/10.
12/04/2010	99	Motion by Corey A. Hill for reconsideration of sentence filed.
12/08/2010	100	Response by USA to Motion by Corey A. Hill for reconsideration of sentence filed.
12/09/2010	106	Minute entry before the Honorable John W. Darrah as to Corey A. Hill: Defendant's Motion for reconsideration of sentence is denied.
12/10/2010	102	Notice of Appeal by Corey A. Hill.

01/25/2011	113	Transcript of Proceedings as to Corey A. Hill held on 06/30/10, before the Honorable John W. Darrah.
01/25/2011	114	Transcript of Proceedings as to Corey A. Hill held on 12/02/10, before the Honorable John W. Darrah.
04/29/2011	118	Opinion from the Court of Appeals for the 7th Circuit; decided 4/7/11. (Entered: 05/03/11).

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

01/18/2011	15 copies of Appellant's brief filed by Appellant Corey A. Hill.
02/18/2011	15 copies of Appellee's brief filed by Appellee USA.
03/11/2011	Filed Appellee USA Citation of Additional Authority, per Circuit Rule 28(e).
04/07/2011	Filed Nonprecedential Disposition per curiam. The judgment of the district court is affirmed. Joel M. Flaum, Circuit Judge; Diane P. Wood, Circuit Judge; and David F. Hamilton, Circuit Judge.
04/07/2011	Order: Final judgment filed per nonprecedential disposition. With costs: no.
04/29/2011	Mandate issued.
08/08/2011	Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari.
11/29/2011	Filed order from the Supreme Court granting the Petition for Writ of Certiorari.

INDICTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA	)	No. 08 CR 486
v.	)	Violation: Title 21, United States Code, Section 841(a)(1)
COREY A. HILL, also known as "C-Note"	)	(Filed Jul. 17, 2008)

THE SPECIAL JUNE 2007 GRAND JURY charges:

On or about March 28, 2007., at Aurora, in the Northern District of Illinois, Eastern Division,

COREY A. HILL,
also known as "C-Note"

defendant herein, did knowingly and intentionally distribute a controlled substance, namely, 50 grams or more of mixtures containing cocaine base in the form of crack cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 21, United States Code, Section 841(a)(1).

A TRUE BILL:

FOREPERSON

UNITED STATES ATTORNEY

TRANSCRIPT OF SENTENCING PROCEEDINGS OF JUNE 30, 2010

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 08 CR 486
-vs-	)	Chicago, Illinois June 30, 2010
COREY A. HILL,	)	1:00 o'clock p.m.
Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE JOHN W. DARRAH

APPEARANCES:

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ALSO PRESENT:	MS. TRACY PHILLABAUM United States Probation Officer

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[2] THE CLERK: 08 CR 486, United States versus Corey Hill.

MR. LANG: Good afternoon, your Honor. Michael Lang for the government.

THE COURT: Good afternoon, Mr. Lang. Good to see you.

MR. EBERHARDT: Good afternoon, your Honor. Steve Eberhardt on behalf of Corey Hill, who is present.

THE COURT: Good afternoon, Mr. Eberhardt. Good to see you as well.

Good afternoon, Mr. Hill.

THE DEFENDANT: Good afternoon, Judge.

THE COURT: I have determined to use a ratio of one-to-one in determining the guideline range between crack cocaine and powder cocaine. I prepared a minute order citing an earlier case that sets out my reasoning, and I have a copy of that, as well as the citation of the earlier case for your benefit.

(Document tendered.)

THE COURT: I also have read the following: I've read the original sentencing paper filed by your office, Mr. Lang, on September 8th of last year, and I read your paper, Mr. Eberhardt, filed on September 6th of last year. Since then the government has filed a supplemental position paper on January 8th of this year and, Mr. Eberhardt, on behalf of [3] your client, you filed a supplemental sentencing memorandum on December 15th.

I also read the letter submitted by you, Mr. Hill, explaining your background and what you think this experience has taught you. And I also read a motion that you filed last year, in May, raising certain issues regarding sentencing.

Mr. Hill, have you received a copy of the presentence investigation report and have you read that?

THE DEFENDANT: Yes, sir.

THE COURT: And, Mr. Eberhardt and Mr. Lang, I know you both have received copies.

MR. EBERHARDT: Yes, your Honor.

THE COURT: The presentence investigation report has determined a total offense level of 30 and a criminal history category of 6.

And I should say, why don't you identify yourself again, Ms. Phillabaum?

PROBATION OFFICER: Your Honor, Tracy Phillabaum, United States probation.

THE COURT: And if I haven't mentioned this to you already, you did a very fine job on the report and I certainly benefitted from your efforts here.

The government in its original papers had computed the total offense level – pardon me, the criminal history category as a Category 5, but then you've amended that [4] position in your subsequent papers and stated it was merely an oversight, Mr. Lang.

MR. LANG: Yes, your Honor. Oftentimes we don't have all the information that probation does, your Honor.

THE COURT: All right. Do you disagree with the presentence investigation report, Mr. Eberhardt, in any regard? Do you have any objections to the contents of the report?

MR. EBERHARDT: Yes, Judge, with regard to the calculation of the criminal history.

On Page 13 Mr. Hill wants to bring up the fact that rather than two points for that 10-23-97 unlawful possession of a controlled substance, that should only be one point because he was sentenced concurrently on another offense with regard to that.

We've mentioned the –

THE COURT: What do you say to that, Mr. Lang?

MR. LANG: Well, I know it was a concurrent sentence, your Honor. I don't recall the offense or the case number, but when he went to Joliet for that it was concurrent. I don't know if that would affect probation's calculation.

THE COURT: Ms. Phillabaum, any thoughts in that regard?

PROBATION OFFICER: Your Honor, I believe I would [5] need a second to take a look, but I believe there was an intervening arrest here, so that's why they are not counted the same.

THE COURT: While we're on the subject, there's also another issue that has been the subject, I think, of the – the Sentencing Commission has revisited the issue, and that is – I'm looking on Page 18, beginning on Line 305: The application of 4A1.1(e), which would add two points if the instant offense was committed less than two years from release in prison on a sentence, or if that had already – if that had already been applied under 4A1.1(d), as it has here, then one point is added.

I believe the Sentencing Commission has abolished that effective later this year.

MR. EBERHARDT: That's another point we were going to bring up, your Honor, yes.

THE COURT: Do you agree with that, Mr. Eberhardt?

MR. EBERHARDT: Yes.

THE COURT: It is still in effect but it will be abolished effective, I think, November of this year.

MR. EBERHARDT: Correct, your Honor.

MR. LANG: So that would just give him a total of two points instead of three? Is that what the Court is saying?

THE COURT: Yes. It would reduce the concurrent [6] sentence charge pointed out by Mr. Eberhardt, and that's that – the one that appears on page – is it Page 13? That would reduce that to one and would subtract another point because of the abolition of the additional point under 4A1.1(e). And I think it's appropriate to give him credit for that.

So that would reduce the total criminal history points – pardon me, the criminal history points from 15 to 13, but 13 or more still results in a level 6, does it not?

PROBATION OFFICER: Yes, your Honor. I can speak to the –

THE COURT: The first issue?

PROBATION OFFICER: Yes. Pursuant to the guidelines 4A1.2(a)(2), it says, if the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest. For example, if the defendant was arrested for the first offense prior to committing the second offense. And that is the case here.

THE COURT: That's the case here, even though the sentences were imposed –

PROBATION OFFICER: – were on the same date.

THE COURT: – on the same day.

So I think in all fairness, the criminal history [7] points should be 14, but it still results in a criminal history Category 6 under the guidelines.

Do you have any other objections to the contents of the report, Mr. Eberhardt?

MR. EBERHARDT: Judge, with regard to the two points operating an uninsured motor vehicle, these were the two points that the government didn't initially count. Apparently their position now is, well, it's like driving without a license.

Well, when you look through the guidelines manual, it does not say anything about driving without insurance. Driving without insurance simply could be a status offense. If Mr. Hill jumped into somebody's car that wasn't insured and he didn't know that, he basically takes the hit for that, and now they want to add two points; whereas if he's driving without a license, there's an element of scienter or knowledge on his part, that he knows he doesn't have a driver's license, or he knows that he's suspended, or he knows that he's revoked. I think that's why you don't find in the guidelines manual the driving on an uninsured vehicle. I think that those two points should not be considered.

THE COURT: What about that, Ms. Phillabaum?

PROBATION OFFICER: Your Honor, I believe the driving under – without insurance, that – I know that I have assigned points to that in other cases. I believe that [8] is addressed in case law. I don't have the case law in front of me.

THE COURT: Mr. Lang, any position in that regard?

MR. LANG: No, other than that we go with probation, your Honor. I did not independently research that, your Honor. I didn't anticipate this. I know I may have failed to mention something earlier, but that was covered in our response.

I would –

THE COURT: I looked at –

MR. LANG: – side with probation, your Honor. I'm sorry.

THE COURT: I'm sorry. I interrupted you.

MR. LANG: I know in my initial response I may have left a few things out, but that was just an oversight, or I didn't have it in front of me. But I will go with probation on that, your Honor.

Have I done any independent research? No. I wasn't even aware it was going to be challenged.

THE COURT: I looked at the sections that you cite, Ms. Phillabaum, and I think you would have to agree they don't specifically cover this offense, 4A1.2(c)(1), 4A1.1(b).

PROBATION OFFICER: Your Honor, based on my experience in writing reports, I know that we do reference convictions for driving without insurance under the [9] conviction section. I just couldn't point you specifically to – I want to say it might be in the gray manual that we referred to or in the case law.

THE COURT: I frankly have never seen this, but I've only been here ten years.

PROBATION OFFICER: Usually it is not assigned points. It is due to the sentence and the length of the sentence. Usually it's never –

THE COURT: Right, usually the offense itself is not assigned points, and I'm going to strike those two points absent any authority to put them in there.

That would reduce the total offense level back down to a 12, which would result in a total offense level of 5. And I think that's the appropriate offense level.

What's the guideline range –

MR. EBERHARDT: Judge, there was one other point that we wanted to bring up.

On Page 16 there's a September 6th of '04 arrest for resisting a peace officer that he's given two points, and that case is –

THE COURT: You're talking about Page 16?

MR. EBERHARDT: Yes, at Line 265.

THE COURT: Got it.

MR. EBERHARDT: And then going over to Page 17, at Line 274 – that 2004 CM 5690, there's a concurrent sentence [10] on that. On 265 the arrest is 9-6 of '04, and 274 the arrest is 9-6 of '04.

THE COURT: And?

MR. EBERHARDT: The cases were consolidated, and we're objecting to the addition of the two points as there was a concurrent sentence on those two.

THE COURT: Well, but there were no points assigned for the offense starting on Line 274 at Page 17, were there? No criminal history points were assigned.

Mr. Eberhardt, there were no criminal history points assigned for the offense set out on Page 274.

MR. EBERHARDT: I see that, Judge.

THE COURT: Yes. So I think the total offense level should be a Level 12 – pardon me. The criminal history category should be a Category 5 based on twelve criminal history points.

Ms. Phillabaum, what guideline range would that result in?

PROBATION OFFICER: With an offense level of 30, your Honor?

THE COURT: Yes – with a one-to-one application of the guidelines from crack to powder cocaine. Would that be a 16?

MR. EBERHARDT: Judge, as we note on Page 2 of our supplemental, it would be a Level 16 and a 5, which would be [11] 41 to 51 months.

THE COURT: 41 to 51 months.

The mandatory sentence without the 851 enhancement is – the mandatory minimum sentence is ten years, is that right?

MR. LANG: Yes, sir.

THE COURT: Something seems out of sync here. Is the government persisting in the 851 enhancement?

MR. LANG: Yes, your Honor. I ran it through my office, your Honor. If the Court wishes me to further consult my office, I would like an opportunity to do that, Judge.

THE COURT: Well, you make a statement in your – and let me say, I read all your arguments, Mr. Eberhardt. You made an Eighth Amendment argument – you made a very strong Eight [sic] Amendment argument. You also argue that a sentence, particularly with the 851 increase, is a patent violation of due process, as arbitrary, capricious and bearing no reasonable relationship between penalty and offense.

And then lastly, you make an argument that if Congress intended that penalty under the statute and the 851 enhancement, that it's also patently inconsistent with the sentencing aims set out by Congress in 3553.

[12] I did some computations. With a criminal history Category 5 and a total offense level of 16, that would present a guideline range for my consideration of 41 to 51 months.

Under the statute and – both the sentencing statute and 851, I would be required to impose a sentence of 240 months. I mean, that's –

MR. EBERHARDT: – about five, six times the sentence.

THE COURT: Right. That's five times the low end of the guideline range and – more than that. Six times the low end of the guideline range almost, and almost five times higher than the low end of the guideline range for a total offense level of 16 and a criminal history category of 5. That just seems as basically unfair as anything that I've ever seen come through here.

MR. LANG: Can we have a sidebar, your Honor?

THE COURT: Yes. We're off the record.

(Sidebar proceedings had off the record.)

THE COURT: There's been a discussion off the record regarding the guideline range as now recomputed because of the Court's application of a ratio of one-to-one crack to powder in determining the total offense level. And we have had a discussion regarding the mandatory minimum sentence required under the statute and the statute enhanced [13] by the 851 notice, and we're going to revisit that issue at a later time.

Mr. Lang, you've indicated, though, you have some other evidence you want the Court to consider?

MR. LANG: With regard to the 851, your Honor, we have three witnesses available to testify.

THE COURT: All right.

MR. EBERHARDT: Can I have one more second, Judge?

THE COURT: All right.

(Discussion had off the record.)

MR. EBERHARDT: I guess we'll have to be ready to proceed, Judge.

THE COURT: All right. Mr. Lang, would you call your witness, please?

MR. LANG: Thank you, Judge.

I call Mark Anton, your Honor.

MARK ANTON, GOVERNMENT'S WITNESS,
DULY SWORN

THE COURT: You may inquire, Mr. Lang.

MR. LANG: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. LANG:

Q. Would you state your name, sir, and your occupation?

A. Mark Anton, A-N-T-O-N, Special Agent with the Bureau of Alcohol, Tobacco, Firearms & Explosives, currently assigned to the Chicago field division.

[14] Q. For how long, sir?

A. Approximately eleven years with ATF and 19 years in law enforcement.

Q. Directing your attention to case No. 08 CR 486, charging Mr. Corey Hill, you're the case agent?

A. Yes, I am.

Q. Did you have occasion to arrest Mr. Corey Hill on June 19th of 2008?

A. Yes, I did.

Q. And did you then transport – you and/or your fellow agents, transport Mr. Hill to the Dirksen Federal Building for an appearance on a complaint before a Magistrate Judge?

A. Yes, in front of Magistrate Arlander Keys. He was subsequently transported for an initial appearance post-arrest.

Q. After that appearance did you then take Mr. Corey Hill, you and/or your fellow agents, to the U.S. Marshal's Service in this building for processing?

A. Yes, I did.

Q. And can you identify Mr. Hill, the individual you took to the marshals and the individual you arrested?

A. Yes. He would be sitting in the orange jumpsuit at the defense table, next to attorney Eberhardt.

MR. LANG: May I approach for one minute, your Honor?

[15] THE COURT: Yes.

The record will reflect the in-court identification of Corey Hill.

BY MR. LANG:

Q. I would like to show this witness a document the government will seek to admit later on in this hearing, your Honor, marked Proposed Government

Exhibit 1-A, as in apple, and 1-B, as in boy, a two-page document.

Do you recognize this, sir?

THE COURT: Do you want to call it Government Exhibit 1 or –

MR. LANG: It would be 1-A, 1-B.

THE COURT: That's fine. This will be Government's Exhibit 1-A and 1-B.

BY THE WITNESS:

A. Yes, I do. I do recognize the two documents.

BY MR. LANG:

Q. And is this a document with Mr. Corey Hill's name, picture, et cetera, fingerprints?

A. Yes. They are the two documents I received from the U.S. Marshal's Service.

Q. You got that from the Marshal's Service?

A. Yes, I did.

Q. And did you take that to – deliver that to Illinois State Police, Bureau of Identification?

[16] A. Yes, I did.

Q. You personally did that?

A. I did.

MR. LANG: No further questions, your Honor.

THE COURT: Any cross, Mr. Eberhardt?

CROSS EXAMINATION

BY MR. EBERHARDT:

Q. Agent Anton, did you roll the prints that are on Exhibit 1-A?

A. I did not.

Q. Did you see the marshals roll the prints thereon?

A. No, I did not, sir.

MR. EBERHARDT: Nothing further.

THE COURT: Agent, you may step down. Thank you. You have nothing further, Mr. Lang, I take it?

MR. LANG: That's Correct, your Honor.

(Witness excused.)

MR. LANG: What I have next, your Honor – and, by the way, I've given defense counsel copies of all of this. They've had it through discovery material as well as marked as exhibits.

I have an Exhibit 2-A, as in apple, B – 2-B, 3-C, 2-D, 2-E, 2-F, 2-G, which would be a series of documents in the case of People of the State of Illinois versus Mr. Corey Hill, 97 CF 2262. It has a – and it's signed by the Clerk [17] of the Circuit Court for Kane County. And it also has a seal on it. I'm asking for this admission as a self-authenticated document pursuant to Federal Rules of Evidence 902.1.

THE COURT: What's the case number on that, Mr. Lang, the Kane County case number?

MR. LANG: I'm sorry, your Honor. The date of what, Judge?

THE COURT: The –

MR. LANG: The certification?

THE COURT: The case number.

MR. LANG: Oh, the case number. 97 CF 2262.

THE COURT: Thank you.

Mr. Eberhardt, any objection to the admission of that group exhibit?

MR. EBERHARDT: No, your Honor.

MR. LANG: May I approach and tender these to the Court, your Honor?

THE COURT: Yes, you can hand those up.

(Document tendered.)

MR. LANG: Our next witness, your Honor, is Joseph Comparone, C-O-M-P-A-R-O-N-E, of the U.S. Marshal's Service.

THE COURT: All right.

JOSEPH COMPARONE, GOVERNMENT'S WITNESS, DULY SWORN

THE COURT: You may inquire, Mr. Lang.

MR. LANG: Thank you, Judge.

[18] DIRECT EXAMINATION

BY MR. LANG:

Q. Sir, would you state your name and occupation?

A. Joseph Comparone, C-O-M-P-A-R-O-N-E. I'm employed by the Marshal's Service.

Q. For how long, sir, approximately?

A. With the government, 21 years.

Q. And your duties with the Marshal's Service, sir?

A. I'm a detention enforcement person for the Marshal's Service.

Q. You do all the fingerprinting?

A. Yes.

MR. LANG: May I approach, your Honor?

THE COURT: Yes.

BY MR. LANG:

Q. Directing your attention to what has been marked Proposed Exhibit 1-A and 1-B, can you identify that, sir?

A. Yes, I can.

Q. What is it?

A. It's a picture and it says Corey A. Hill, and there's also a fingerprint card on here, too.

Q. Is that two pages?

A. Pardon me?

Q. That's two pages, correct?

A. Yes.

[19] Q. And the prints that are on there, did you take those fingerprints?

A. Yes, I did.

Q. And there's the name of an individual on there, Corey Hill?

A. Yes.

Q. And it reflects an arrest date of 6-19-08, is that correct?

A. Yes, sir.

Q. And after you took those fingerprints, sir, did you send them somewhere?

A. Yes. They are sent to the – it's called AFIS, Automated Fingerprint Identification Section, in Washington, D.C.

Q. And did you get something back from them after you sent in the fingerprints?

A. Yes, I did, sir.

Q. What did you get back?

A. I had a – it's called a rap sheet. It gives all the information about prior arrests, what have you. It identifies the individual –

Q. Okay. Directing your attention to 1-A and 1-B Proposed, is 1-B something you got back from them?

A. Pardon me?

Q. Is Proposed 1-B, the second page there, is that a copy [20] of what you got back?

A. Yes.

Q. Okay. 1-A went to the system and you got 1-B back, is that correct?

A. Correct.

Q. I would like to show you what has been marked Proposed Exhibit 1-C. Do you see that, sir?

A. Yes, I do.

Q. And is that the actual –

MR. LANG: May I approach, your Honor?

THE COURT: Certainly.

BY MR. LANG:

Q. Is that a copy of a computer generated fingerprint card you did in this case?

A. Yes, sir, with the actual print on there.

Q. For Mr. Hill?

A. Yes.

Q. And there's certain information on there. In fact, does your name appear on the reverse side of that, sir?

A. My name is on the back of the print card, indicating I was the person that had taken the print.

Q. And it also indicates that there were tattoos and the date of offense?

A. Yes, it does. It has – it identifies left arm and right arm having tattoos, the charge, address and the date, [21] yes.

Q. And did any of that information come from Mr. Hill?

A. Yes, it did.

Q. Directing your attention to what has been marked Proposed Exhibits 1-D, as in David, 1-E, as in Edward. Do you see those documents, sir?

A. 1-D has a front and side picture of Corey Hill, which I had taken.

Q. You took that photograph?

A. Pardon?

Q. You took the photograph?

A. Yes, I did.

And also identifying characteristics with – left and right arm with tattoos on there.

Q. Did you take those photographs as well, sir?

A. Yes, sir.

THE COURT: Would that be Government 1-E, Marshal, that you took the pictures of the tattoos?

MR. LANG: That, your Honor, I believe would be 1 – pictures, your Honor, of the face would be 1-D, as in David, the tattoos, your Honor, 1-E, as in Edward.

THE COURT: Okay.

MR. LANG: And before that, your Honor, we had 1-A, 1-B and 1-C, like Charlie.

THE COURT: Got you.

[22] MR. LANG: Excuse me one minute, your Honor. (Brief pause.)

MR. LANG: I would move the admission of those exhibits into evidence, your Honor.

THE COURT: Any objection to the admission of Government's Exhibits 1-A, B, C, D and E?

MR. EBERHARDT: No, your Honor.

THE COURT: Okay. Those are all admitted into evidence.

(Said exhibits were admitted into evidence.)

MR. LANG: No questions, your Honor.

THE COURT: Mr. Eberhardt, any questions?

MR. EBERHARDT: No questions, your Honor.

THE COURT: Marshal, you may step down. Thank you for coming in.

THE WITNESS: Thank you, sir.

THE COURT: Thank you.

(Witness excused.)

THE COURT: Anything further, Mr. Lang?

MR. LANG: Yes, sir, one more witness.

RONALD JORDAN, GOVERNMENT'S
WITNESS, DULY SWORN

THE COURT: You may inquire, Mr. Lang.

MR. LANG: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. LANG:

[23] Q. Would you state your name, sir, and occupation?

A. Ronald Jordan. I work for the Illinois State Police, Bureau of Identification.

Q. And how long have you been so employed, sir?

A. 16 years.

Q. What are your duties there, sir?

A. I'm the unit manager over 27 fingerprint technicians and AFIS operations.

Q. And AFIS, is that A-F-I-S?

A. Yes, sir, Automated Fingerprint Identification System.

Q. And do you have a supervisory role there, sir?

A. I'm the unit manager.

Q. And how many technicians do you supervise?

A. 27 fingerprint technicians.

Q. And you have testified both in the state and federal court before?

A. Yes, I have.

Q. Showing you what has been marked for identification as Government Proposed Exhibit 3-A, as in apple, do you see that, sir?

A. Yes, I do.

Q. Can you indicate what that is?

A. That's a copy of a master fingerprint card on file with the State Police.

Q. When you say master fingerprint card, what does that [24] mean, sir?

A. That's the record – the first entrance of the individual into the criminal justice system; a record was established on his first arrest.

Q. And Proposed 3-A, does that have a person's name on it?

A. Corey Hill.

Q. And do you know what date that came to your attention?

A. 9-19, 1996.

Q. Okay. And does that document have an SID number on it?

A. Yes, it does.

Q. What is the significance of an SID number, sir?

A. It's a state identification number issued when the record was created.

Q. And in this particular instance, the SID number is what, sir?

A. 38096970.

Q. And that number is established when the first set of prints arrives for anybody?

A. Correct.

Q. And thereafter any other prints that come to your attention, are they determined whether they come under that same SID number?

A. Yes, they are.

Q. And is that done – is that a computer generated mechanism, or is it manual or both?

[25] A. Both.

MR. LANG: Excuse me, your Honor.

THE COURT: Take your time, Mr. Lang.

(Brief pause.)

BY MR. LANG:

Q. Did you have occasion, sir, to come into contact with Proposed Exhibits 3-B and 3-C, Charlie?

A. Yes.

Q. And what is 3-B?

A. 3-B is a booking slip for an arrest from Kane County.

Q. Okay. And is there a date on there?

A. 10-24, 1997.

Q. A charge?

A. Possession of 400 but less than 900 grams.

Q. And is there an SID number associated with that particular arrest?

A. Yes, there is.

Q. And what would that be?

A. 38096970.

Q. Is that the same number that you took off the master for Mr. Corey Hill?

A. Yes, it is.

Q. And associated with that arrest, referring to Proposed Exhibit 3-C, Charlie, is there a fingerprint card?

A. Yes, there is.

[26] Q. And did that accompany – did 3-C accompany 3-B?

A. Yes, it did.

Q. And what is 3-C, sir?

A. 3-C is the fingerprint card from another arrest from Kane County.

Q. And does that also have an SID number on it, sir?

A. Yes, it does.

Q. And the fingerprints on Proposed Exhibit 3-C, are they the same as the master, Proposed Exhibit 3-A?

A. The prints were made by the same individual, yes.

MR. EBERHARDT: Objection.

THE COURT: Basis?

MR. EBERHARDT: Basis of his opinion, conclusion.

THE COURT: Well, I think all experts testify to conclusions – are permitted to testify to conclusions. The question is, do you challenge Mr. Jordan's qualifications to testify as a fingerprint expert?

MR. EBERHARDT: I'll reserve it for cross, your Honor.

THE COURT: All right. Then I'll let the answer stand subject to your cross-examination.

If you don't renew your objection during cross-examination, I'll deem that answer to be admitted.

MR. EBERHARDT: Thank you.

BY MR. LANG:

[27] Q. Sir, you formed that opinion with regard to Proposed Exhibit 3-C being the same prints, if you will, as on Proposed Exhibit 3. How did you arrive at that?

A. The match was made by computer and verified by a fingerprint technician.

Q. By a computer?

A. By computer and verified by a fingerprint technician.

Q. And verified by a fingerprint technician, which would be a person?

A. Yes.

Q. Okay. Did you play any role in that, sir?

A. Not in this particular one, no.

Q. Okay. And directing your attention to Proposed Exhibit 3-D, as in David, can you identify that, sir?

A. It's a custodial receipt card from Joliet Correctional Center.

Q. And there are fingerprints on there?

A. Yes, there are.

Q. And there's a person named in that document?

A. Corey Hill.

Q. And this would reflect actually going to an institution for custody?

A. Yes.

Q. And it's customary to fingerprint upon arrival?

A. Yes, it is.

[28] Q. And is there an SID number on that, sir?

A. Yes, there is.

Q. And what is it?

A. 38096970.

Q. And were the fingerprints on Proposed Exhibit 3-D compared with the master, Proposed Exhibit 3-A?

A. Yes, they were.

Q. By computer and manual?

A. Yes.

Q. Did you play any role in that?

A. Not that particular arrest, no.

Q. And was there a match?

A. Yes, there was.

Q. Referring to Proposed Exhibits 3-E, as in Edward, 3-F, as in Frank, 3-G, George, do those reflect an SID number, the same for Mr. Hill, as 38096970?

A. Yes, they do.

Q. And are those various arrests on various dates stated therein in connection with the Kane County drug charge?

A. I don't know that those three arrests relate to that Kane County charge.

Q. Okay. But you have the dates of the arrest as August 20th of '02 –

A. Yes.

Q. – August 29th of '02 and May 29th of '03?

[29] A. Correct.

Q. And are there fingerprints on each one?

A. Yes.

Q. And Proposed 3-E, 3-F and 3-G, are they all the same person?

A. Yes.

Q. And they all match with the master, 3-A, as in apple?

A. Yes.

Q. And how do you know that, sir?

A. They were matched by computer and verified by technician.

Q. Directing your attention to Exhibit 1-A and 1-B –

MR. LANG: I believe, your Honor, they have already been admitted.

BY MR. LANG:

Q. – do you see that, sir?

A. Yes.

Q. And do you know how 1-A and 1-B came to the attention of your office, sir?

A. They were delivered by an ATF agent for comparison.

Q. And have you had an occasion to examine those fingerprints depicted on 1-A?

A. Yes.

Q. And was there a comparison made that established that those prints belonged to the same individual with the SID No. [30] 38096970?

A. Yes, there was.

Q. And how did that happen?

A. It was a manual comparison performed by a fingerprint technician, verified by –

Q. Who?

A. – by a fingerprint technician, Linda Kelly, verified by me.

Q. Could you spell her name, please?

MR. EBERHARDT: Objection, hearsay.

THE COURT: Well, we're at sentencing now and Section 6A1.3 says, (a), when any factor important to the sentencing determination is reasonably in dispute, the parties shall be given an adequate opportunity to present information to the Court regarding the factor. In resolving any dispute concerning a factor important to the sentencing determination, the Court may consider relevant information without regard to its admissibility under the Rules of Evidence applicable at trial provided the information has sufficient indicia of reliability to support its probable accuracy.

And I find, based on all of the testimony, that this testimony, specific testimony, does have specific indicia of reliability to support its probable accuracy. So overruled on the grounds of hearsay.

[31] This is a wonderful rule. We should have this in effect more often.

You may proceed, Mr. Lang.

BY MR. LANG:

Q. What was the name of that technician, sir?

A. Linda Kelly.

Q. Would you spell it, please?

A. K-E-L-L-Y.

Q. And referring to Proposed Exhibit – or Exhibit 1-A, what date was that performed on?

A. 6th of August, 2009.

Q. Now, did you play any role in that match-up?

A. She made the identification and I verified the identification along with an additional fingerprint supervisor.

Q. How did you verify it, sir?

A. I watched her perform the match herself, and then I verified the points that she used to make the identification.

Q. Plus another supervisor?

A. Yes.

Q. So you kind of repeated what she did?

A. Basically, yes.

Q. Have you had occasion to see what has been marked as Exhibit 1-C, as in Charlie?

Do you have that there, sir?

[32] A. Yes, I do.

Q. And is that purportedly a fingerprint card prepared by the U.S. Marshals?

A. Yes, sir.

Q. And did you have occasion to compare the prints on that card with the master?

A. Yes, I did.

Q. Same person?

A. Same person.

Q. Did you at all – did you compare it to the actual prints for the Kane County or just compare it to the master?

A. Both.

Q. So the arrest card for the Kane County charge, you compared it to that as well?

A. Yes.

Q. Same person?

A. Same person.

MR. LANG: Excuse me, your Honor.

(Brief pause.)

MR. LANG: Your Honor, I would move for the admission of Exhibits 3-A through 3-G.

THE COURT: Mr. Eberhardt, subject to your cross-examination?

MR. EBERHARDT: Please, your Honor.

THE COURT: And again, hearing no objection at the [33] conclusion of your cross, they will be deemed to be admitted.

MR. LANG: I believe, your Honor, for the record, the government's marked Exhibits 1, 2 and 3, I have moved for all their admission.

THE COURT: Those are in.

(Said exhibits were received into evidence.)

MR. LANG: Thank you, sir.

No further questions.

THE COURT: Okay. Cross?

CROSS EXAMINATION

BY MR. EBERHARDT:

Q. Mr. Jordan, you've been a supervisor for the Bureau of Identification for 16 years?

A. Yes.

Q. And you are aware that in your supervisory capacity that there are individuals in the State of Illinois who have multiple SIDs, or state identifying numbers, issued to them, correct?

A. There are multiple SID numbers for single individuals, yes.

Q. And this is based on the fact that different technicians initially classify the prints different ways, different numbers are generated?

A. That's a possibility, but generally it's due to the quality of the fingerprints, and a person having a false [34] positive would rather have a false negative than a duplicate record.

Q. With regard to Government Exhibit 1-A that was pointed out to you – do you have that in front of you, sir?

A. Yes, I do.

Q. Okay. Both above and below the fingerprints there's a note on there that they are intended for display purposes only and not an official record, correct?

A. That is correct.

Q. Then turning to 1-C that's in front of you, this is the fingerprint card that you yourself double-checked with Ms. Kelly's work?

A. Correct – well, yes.

Q. You said that you compared points of identification with regard to 3-A and 1-C, correct?

A. Yes.

Q. Can you identify which fingers that you compared – or, strike that.

Take the left thumb, first of all, on 3-A –

A. Okay.

Q. – the left thumb on 1-C. Can you tell us how many and what points of identification you used to determine that those were a match?

A. I cannot without use of a magnifying glass and counting the ridges and the other tools that are necessary.

[35] THE COURT: Bear in mind those are all in evidence, Mr. Eberhardt.

BY MR. EBERHARDT:

Q. With regard to any printed information with the name Corey Hill on there – on any of these cards, do you have any firsthand knowledge that that's the same Corey Hill that's sitting here?

A. No, I do not.

MR. EBERHARDT: I have nothing else, Judge. I still make our objection.

THE COURT: All right. The objection is overruled. Specifically, Government's Exhibits 3-A, B, C, D, E and F are all admitted over your objection, Mr. Eberhardt, based on the criteria that I just read from the United States Sentencing Manual.

(Said exhibits were received into evidence.)

THE COURT: Anything further, Mr. Lang?

MR. LANG: Just one point of clarification.

REDIRECT EXAMINATION

BY MR. LANG:

Q. Ms. Kelly worked on Exhibit 1-A, is that correct – comparing Exhibit 1-A to 3-A?

A. Correct.

Q. All right. That's where you – you were looking over her shoulder, is that –

[36] A. Yes.

MR. LANG: All right. Thank you, Judge.

THE COURT: Anything further, Mr. Eberhardt?

MR. EBERHARDT: No, Judge.

THE COURT: Mr. Jordan, you may step down. Thank you very much.

(Witness excused.)

THE COURT: Mr. Lang, do you have anything further to offer at this time regarding sentencing?

MR. LANG: No, your Honor.

THE COURT: Mr. Eberhardt, is there anything that you want to offer at this time concerning sentencing?

MR. EBERHARDT: No, your Honor.

THE COURT: All right. We're going to continue this matter for further sentencing hearing.

Mel?

THE CLERK: September 22nd at 1:00 o'clock p.m.

MR. LANG: I'm sorry, your Honor. I missed that date.

THE COURT: September 22nd at 1:00 p.m. Mr. Lang, is that convenient for you?

Mr. Eberhardt, is that a good date for you?

MR. EBERHARDT: If I could have a moment, Judge.

MR. LANG: Yes, sir. September 22nd, your Honor?

THE COURT: Yes.

[37] MR. LANG: My hearing is not good. 1:00 p.m.?

THE COURT: 1:00 p.m.

MR. EBERHARDT: Judge, actually, could we do the sentencing sometime before the 13th, unless you're going to break from the Zhang trial that starts on the 13th of September?

THE COURT: Well, I would expect this is going to take some time. Is there any date before the 13th, Mel?

THE CLERK: September 2nd at 1:00 o'clock p.m.

THE COURT: Mr. Lang?

MR. LANG: Yes, sir.

THE COURT: Mr. Eberhardt?

MR. EBERHARDT: That's fine, your Honor.

THE COURT: September 2nd at 1:00 p.m. it is. Off the record.

(Discussion had off the record.)

THE COURT: Thank you. Have a nice summer.

MR. EBERHARDT: Thank you.

(Which were all the proceedings heard.)

[Certificate Of Court Reporter Omitted In Printing]

DISTRICT COURT ORDER OF JUNE 30, 2010

United States District Court, Northern District of Illinois

MHN

Name of Assigned Judge or Magistrate Judge	John W. Darrah		
	Sitting Judge if Other than Assigned Judge	/s/ John W. Darrah	
CASE NUMBER	08-cr-486-1	**DATE**	06/30/10
CASE TITLE	United States v. Corey A. Hill		

DOCKET ENTRY TEXT

For the reasons stated below, the Court will apply a 1:1 crack-to-powder cocaine ratio for purposes of determining Defendant Corey A. Hill's sentence.

■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

Defendant Corey A. Hill was charged in a one-count Indictment with violating 21 U.S.C. § 841(a)(1) by knowingly and intentionally distributing 50 grams or more of mixtures containing cocaine base in the form of crack cocaine. On April 22, 2009, a jury returned a verdict of guilty and found that the amount and form of the controlled substance distributed by Defendant had been proven beyond a reasonable doubt to be 50 grams or more of mixtures containing cocaine base in the form of crack cocaine.

For the reasons set out in the Court's April 28, 2010 Order in the case of *United States v. Raphael Rollins*, No. 08-cr-1014-5 (N.D. Ill.), the Court will apply a 1:1 crack-to-powder cocaine ratio for purposes of determining Defendant's sentence.

DISTRICT COURT ORDER IN *UNITED STATES V. ROLLINS*

United States District Court, Northern District of Illinois

MHN

Name of Assigned Judge or Magistrate Judge	John W. Darrah		
	Sitting Judge if Other than Assigned Judge	/s/ John W. Darrah	
CASE NUMBER	08 CR 1014-5	**DATE**	4/28/10
CASE TITLE	United States v. Raphael Rollins		

DOCKET ENTRY TEXT

For the reasons stated below, the Court will apply a 1:1 crack-to-powder cocaine ratio.

■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

On October 14, 2009, Defendant Raphael Rollins entered into a Plea Agreement admitting his guilt in violating 21 U.S.C. § 843(b), use of a communication facility in the commission of a felony (Counts V and XVII). Defendant admitted that he was responsible for the distribution of approximately 1 kilogram of crack cocaine. The question before the Court is what crack-to-powder ratio to apply in sentencing. Defendant urges the Court to apply a 1:1 ratio.

In *Spears v. United States*, ___ U.S. ___, 129 S. Ct. 840 (2009) (*Spears*), the United States Supreme Court held that district courts "are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." *Spears*, 129 S. Ct. at 843-44. Discussing a district court's discretion to reject the 100:1 crack-to-powder ratio, the Court stated:

> "A sentencing judge who is given the power to reject the disparity created by the crack-to-powder ratio must also possess the power to apply a different ratio which, in his judgment, corrects the disparity. Put simply, the ability to reduce a mine-run defendant's sentence necessarily permits adoption of a replacement ratio."

Id. at 843.

In considering what ratio to apply, the Court finds instructive the opinion of Judge Bennett in *United States v. Gully*, 619 F. Supp. 2d 633 (N.D. Iowa 2009) (*Gully*). In *Gully*, Judge Bennett set out and explored a number of policy reasons favoring a 1:1 crack-to-powder ratio: (1) the 100:1 ratio adopted by the Sentencing Commission was the result of a legislatively enacted weight-driven scheme rather than the Commission's usual empirical approach; (2) the 100:1 ratio depended on assumptions about the relative harmfulness of crack and powder cocaine that are no longer supported by the evidence; (3) the 100:1 ratio is inconsistent with punishing major drug traffickers more severely than low-level dealers since the former deal generally with powder cocaine while the latter convert the drug into crack;

and (4) the 100:1 ratio fosters disrespect for and lack of confidence in the criminal justice system due to its disproportionate impact on African Americans. *Id.* at 638-39. Judge Bennett, taking into account these considerations, found that a 1:1 crack-to-powder ratio was appropriate in all crack cocaine cases. *Id.* at 644.

Other Courts have followed *Gully*'s lead. In *United States v. Lewis,* 623 F. Supp. 2d 42, 47 (D.D.C. 2009) (*Lewis*), Judge Friedman concurred in *Gully*'s reasoning and adopted a 1:1 crack-to-powder ratio for all crack cocaine cases. Judge Cohill, in *United States v. Russell,* 2009 WL 2485734 (W.D. Pa. Aug. 12, 2009) (*Russell*) also followed the reasoning of *Gully* in reaching the same conclusion. Judge Cohill noted that a "significant factor" in his decision was that the 100:1 ratio is "a 'remarkably blunt instrument' when used as a proxy to punish crack offenders based on the assumption that offenses involving crack are more likely to involve violence, weapons, and higher levels of crime." *Id.* at *3 (quoting *Gully,* 619 F. Supp. 2d at 641). Judge Cohill found that "[t]he better approach is to enhance the sentence of an individual defendant in cases that actually involve violence, weapons, or other aggravating factors, depending as well on whether the particular defendant is a chronic offender." *Id.*

Furthermore, the Court notes that the current administration has criticized the 100:1 ratio. Attorney General Eric Holder has stated:

> It is the view of this Administration that the 100-to-1 crack-powder sentencing ratio is simply wrong. It is plainly unjust to hand

> down wildly disparate prison sentences for materially similar crimes. It is unjust to have a sentencing disparity that disproportionately and illogically affects some racial groups.

Attorney General Eric Holder, Remarks as Prepared for Delivery by Attorney General Eric Holder at the D.C. Court of Appeals Judicial Conference (June 19, 2009), *available at* www.usdoj.gov/ag/speeches/2009/ag-speech-090619.html. This assessment conforms with the testimony of Assistant Attorney General Lanny Breuer before the Subcommittee on Crimes and Drugs of the United States Committee on the Judiciary. Breuer stated:

> [W]e cannot ignore the mounting evidence that the current cocaine sentencing disparity is difficult to justify based on the facts and science, including evidence that crack is not an inherently more addictive substance than powder cocaine. We know of no other controlled substance where the penalty structure differs so dramatically because of the drug's form.
>
> Moreover, the Sentencing Commission has documented that the quantity-based cocaine sentencing scheme often punishes low-level crack offenders far more harshly than similarly situated powder cocaine offenders. . . . The impact of these laws has fueled the belief across the country that federal cocaine laws are unjust.

Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the

Subcomm. on Crimes and Drugs of the S. Comm. on the Judiciary, 111th Cong. 1 (2009) (Statement of Lanny A. Breuer, Assistant Attorney Gen. of the Criminal Division, United States Department of Justice, at 9).

The Court finds *Gully, Lewis* and *Russell* to be highly persuasive and adopts the reasoning set out in those cases. Therefore, the Court will apply a 1:1 crack-to-powder cocaine ratio in this case.

TRANSCRIPT OF SENTENCING PROCEEDINGS OF DECEMBER 2, 2010

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. 08 CR 486
-vs-	)	Chicago, Illinois
COREY A. HILL,	)	December 2, 2010
Defendant.	)	1:00 o'clock p.m.

TRANSCRIPT OF PROCEEDINGS – SENTENCING
BEFORE THE HONORABLE JOHN W. DARRAH

APPEARANCES:

For the Plaintiff:	HON. PATRICK J. FITZGERALD United States Attorney BY: MR. MICHAEL LANG Assistant United States Attorney 219 South Dearborn Street Chicago, Illinois 60604
For the Defendant:	LAW OFFICES OF STEPHEN E. EBERHARDT MR. STEPHEN E. EBERHARDT 16710 Oak Park Avenue Tinley Park, Illinois 60477
ALSO PRESENT:	MS. TRACY PHILLABAUM United States Probation Officer

Mary M. Hacker
Official Court Reporter
United States District Court
219 South Dearborn Street, Suite 1212
Chicago, Illinois 60604
Telephone: (312) 435-5564

[2] THE CLERK: 08 CR 486, United States versus Corey Hill.

MR. EBERHARDT: Good afternoon, your Honor. Steve Eberhardt on behalf of Mr. Hill, who is here now.

THE COURT: Good afternoon, Mr. Eberhardt.

MR. LANG: Good afternoon, your Honor. Michael Lang for the government.

THE COURT: Good afternoon, Mr. Lang.

PROBATION OFFICER: Tracy Phillabaum, United States probation.

THE COURT: Good afternoon. You did a very fine job on your report. I think I mentioned that before.

PROBATION OFFICER: Thank you.

THE COURT: Good afternoon, Mr. Hill.

THE DEFENDANT: Good afternoon.

THE COURT: This matter comes on for sentencing. We've already conducted part of the sentencing hearing.

Mr. Hill, you have received a copy of the presentence investigation report, have you not, and you've read it?

THE DEFENDANT: Yes, sir.

THE COURT: As have you, Mr. Eberhardt, and you, Mr. Lang.

At the last hearing the Court had made certain determinations regarding the application of the crack to [3] powder ratio, and I had entered a minute order finding that the appropriate ratio would be one-to-one, crack to powder ratio. I also had determined that the criminal history was a Category 5.

Mr. Lang, do you agree – I know you might not agree with my determination, but you agree I've made those determinations?

MR. LANG: Yes. And I would apologize to the Court, your Honor. In my second submission I messed up. I think I had in there calculating Mr. Hill as a 6. That was my error, your Honor. I forgot to take out that –

THE COURT: That one point that has no longer – is no longer being applied.

MR. LANG: Yes. So it went from I think 13, your Honor, to 12. So that was my mistake.

So under the – at least under the guidelines that are in effect now, your Honor, I believe the range would be 110 to 137.

THE COURT: Well, the guidelines as I determined them to be –

MR. LANG: I'm sorry, sir. I mean, assuming –

THE COURT: Assuming the presentence investigation guidelines and their ratio was applied.

But based on the ratio of one-to-one, it would result in a total offense level of 16 and a criminal history [4] category of 5, which would produce a guideline suggested range of confinement of 41 to 51 months.

MR. EBERHARDT: Yes.

THE COURT: Now the issue, of course, is the application of the ten-year – and I should ask you again, is there anything that should be spread of record regarding any objections that you have to the report that we haven't already discussed, Mr. Eberhardt?

MR. EBERHARDT: Not that we've already discussed, your Honor.

THE COURT: All right. And, Mr. Lang, the same is true with you?

MR. LANG: Yes, sir.

THE COURT: Okay. Now the question is whether or not the Fair Sentencing Act of 2010 abrogates the application of the mandatory sentence of, in this case now, ten years.

The government has dismissed its 851 information, I take it, Mr. Lang?

MR. LANG: Yes. The Court dismissed that, your Honor.

THE COURT: I dismissed that after – there was a hearing on that issue. I recall that. I dismissed that.

So the exposure now, if the mandatory provisions are in effect, would be ten years. If the Fair Sentencing Act excuses the application of that – or obviates the [5] application of that, then Mr. Hill would be eligible as a serious trafficker of a five-year mandatory minimum. Is that right, Mr. Eberhardt?

MR. EBERHARDT: Yes.

THE COURT: All right. Okay.

You've made several arguments – I should say, I went back and read everything. There were several sentencing memoranda that had been filed prior to this issue, going back to 2009. I read all of those. And I re-read the sentencing investigation report. And each of you have provided upward of – position papers – Mr. Lang, you filed a supplemental position paper on January 8th of this year. Mr. Eberhardt, you filed a second supplemental sentencing memorandum on October 25th of this year. And, Mr. Lang, you filed a response to that on October 29th of this year.

Mr. Eberhardt, you provided the Court with an opinion by Judge Hornby, a district judge in Maine, and the application of the 2010 Fair Sentencing Act to the mandatory minimum provisions. And Judge Hornby concluded, based on the text of the act, its title, its preamble, the emergency authority afforded to the Commission and the Sentencing Reform Act of 1984 – he concluded that congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct had occurred before the enactment. And I'm citing from – [6] I've got a Lexis cite of 2010 U.S. District Lexis, 114464.

Mr. Lang, you provided me with a Seventh Circuit opinion, United States of America versus Christopher C. Bell, and I have a Westlaw cite on that as 2010 WL 4103700. And that's a Seventh Circuit opinion that was decided on October 20th of this year, and they reach a different conclusion.

In your papers, Mr. Eberhardt – and you did a really fine job.

MR. EBERHARDT: Thank you, your Honor.

THE COURT: You made an excellent argument here.

MR. EBERHARDT: I have to thank all the staff federal defenders around the country working on the issue also.

THE COURT: I did notice a certain similarity of language between your memorandum and some of the language in those other cases, but I guess that's what research is all about.

The principal argument in your papers is the issue of the application of the general saving statute. And then you make some other arguments, which I think you've made before, regarding the application of the mandatory guidelines as would be in conflict with the equal protection clause with Eighth Amendment prohibition against cruel and unusual punishment – I should say the Fifth Amendment clause [7] regarding equal protection and some other issues which, frankly, I think are not as persuasive as the issue regarding the application of the savings statute.

As I read the Bell case, I think the Bell case ironically is squarely on point here. In the Bell case, as in here, if the minimum quantity of crack required to trigger the mandatory minimums was as determined by the 2010 Fair Sentencing Act, Mr. Hill would be deemed to be a serious trafficker; that is, someone that had trafficked in 28 grams but not more than – but not 280 grams, would be a serious trafficker, which would result in a – in this case, a 30-month – no, a 60-month sentence of five years.

If he were found to be a major trafficker under the old law, then the ten-year mandatory minimum sentence would be in effect.

The Seventh Circuit discusses the same cases that you raised and that appear in Judge Hornby's opinion as well. You make a very persuasive argument relying on United States versus Kolter, and that's cited in both your papers beginning on Page 6 and in the Seventh Circuit opinion in Bell.

In Kolter your argument was that the redefinition simply redefined the class of individuals that was subject to the punishment and didn't change the punishment. Hence, the savings clause was inapplicable. And in this case, because of the new act, that Mr. Hill would simply be defined – [8] redefined now as a serious trafficker, not a major trafficker.

The Seventh Circuit, Judge Tinder writing for the majority, squarely rejects that interpretation and distinguishes Kolter from its application here.

You also argue that the savings statute does not bar retroactive application of the Fair Sentencing Act of 2010 because it is curative or remedial. And you cite Mechem; that's a Tenth Circuit 1975 case construing an analgous statute, 509 F2d 1193, as well as United States versus Blue Sea, 533 F2d 445, and that's a Fifth Circuit 1977 case. You cite those cases in your papers on Pages 13 and 14 of your second supplemental sentencing memorandum.

And again, Judge Tinder, writing for the majority of the Seventh Circuit opinion in Bell, distinguishes those cases and finds them inapplicable.

I think the Seventh Circuit opinion is binding on this Court and, therefore, I hold that the 2010 Fair Sentencing Act does not apply retroactively to conduct committed before its effective date.

Your arguments were really well made, as were yours, Mr. Lang. I don't want to preclude you from making any other formal statements, should you choose, but I've read everything you gave me and I've read all those cases.

Anything further you want to say, Mr. Eberhardt?

[9] MR. EBERHARDT: Yes, Judge.

I would just like to add, obviously the government is relying on the Bell case, and my experience has been now, since the Fair Sentencing Act went into effect, apparently the government's position – and obviously Mr. Lang will correct me if I'm wrong – is because Mr. Hill –

THE COURT: He might even correct you if you're right.

MR. EBERHARDT: That could be, too – because Mr. Hill was arrested prior to August 3rd, 2010, he's subject to the old law of the mandatory minimums.

The government's position that I've been seeing throughout this building now is if somebody is arrested on August 2nd of 2010 and they go to trial and they are found guilty and they are sentenced in 2014, 2015, the government is going to come in here and they're going to say, you know what? You were arrested on August 2nd of 2010, so the old law applies to you because of the savings clause in 109.

But the trouble I have with that, Judge, is we also have emergency guideline amendments that went into effect – I'll digress a minute.

Bell – and as Judge Hornby in Maine points out, Bell is a case, and all the cases cited by the Seventh Circuit, are cases where a defendant was sentenced, and then when the case was pending on appeal, a motion was made [10] attacking the prior sentence. So it's not a situation of where the sentencing had not been imposed subsequent to the Fair Sentencing Act.

But sometimes –

THE COURT: I considered that, Mr. Eberhardt, and I – Judge Hornby's language at the end of the opinion says, quote, I conclude, based on the context of the act, its title, its preamble, the emergency authority afforded to the Commission and the Sentencing Reform Act of 1984, that congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before the enactment.

And I think both sides – I think both Bell and Moreno – pardon me, Douglas both agree that the issue is whether or not the act applies retroactively to the time of the conduct of the offense. I don't see sentencing after conviction as being anything that is particularly operative in determining the application of the savings clause. I think it's when the conduct occurred.

If you've got any authority on that, I would sure look at it. But I didn't see anything like that in any of those cases. The focus seems to be at the time of the occurrence, which generally is consistent with the application of criminal law.

MR. EBERHARDT: But I would –

[11] THE COURT: I understand that distinction and it occurred to me as well.

MR. EBERHARDT: And I would, for the purposes of the record, then point out to the Court, Judge Hornby further, beyond what you've read, your Honor – in the words of the Supreme Court, is either, quote, a necessary implication, unquote, or a, quote, fair implication, unquote, that although retroactivity to those previously imprisoned might not be contemplated, meaning the Bell situation, the Fair Sentencing Act of 2010 permits no further federal crack sentencings that are not fair.

THE COURT: I think that is a reference to the underlying basis of his opinion. I don't think that necessarily – I think he's saying that based on the act, the legislative history, that congress simply intended the act to be applicable retroactively because it has now recognized the unfairness in the mandatory sentences.

I don't see as operative in that phrase – and it might have been that phrase that triggered this inquiry in my mind as well. I don't see anything as operative in that phrase that would distinguish between somebody that has been convicted and not yet sentenced and someone that has been sentenced when in both instances the conduct occurred before the effective date of the new act.

I see your point but I don't see that as terribly [12] operative.

MR. EBERHARDT: But I would add one more point then, Judge.

To use the mandatory minimums under the old law basically negate the guideline amendments that went into effect November 1st, not necessarily in a situation like Mr. Hill because of the amount, but there will be cases where the guidelines – well, actually it is in this case – there will be cases where the new guidelines – if he was sentenced under the new guidelines, which obviously we all know –

THE COURT: Except I gave him a benefit greater than what's provided in the new guidelines.

MR. EBERHARDT: And under the new guidelines your Honor obviously can still do that. I just got done with a sentencing in front of Judge Coar where Judge Coar had not made a previous one-to-one finding, and just two weeks ago he said, even with the Fair Sentencing Act's 18-to-1, I am still going to find one-to-one. And it was based on information – I don't know if I have the article, but again, I'm sure you're aware of it, I'm sure the government is aware of it, in the Daily Law Bulletin, where Judge Castillo made comments. He was the only individual on the Sentencing Commission who voted against the 18-to-1 and made comments about actually it should be the one-to-one based on what judges have been finding for the past two or three years now. [13] And that was based on Senator Durbin coming to Judge

Castillo saying, well, you know, this compromise legislation of 18-to-1 doesn't necessarily mean that the sentencing guidelines have to be 18-to-1; it could be *something different*. And, unfortunately, Judge Castillo lost.

But by using the mandatory minimums and taking – you know, aside from the fact that you've already found one-to-one, which I suggest needs to be done, a district judge, like Judge Coar, still has – and your Honor – has the discretion to determine one-to-one, but it makes the guidelines absolutely meaningless.

So the guidelines – so congress, on the one hand, said, *put into effect new guidelines, the new guidelines* come into effect –

THE COURT: But maintain the mandatory minimums. I agree with you. There's a certain inconsistency.

It seems to me it's curious that congress can now negotiate the amount of social harm that's occasioned by the distribution of crack cocaine as opposed to regular cocaine, that we can arrive at that not scientifically but through some sort of legislative compromise. But I guess that's the way our government runs.

You're preaching to the choir, Mr. Eberhardt, but I read Bell as absolutely dispositive in this case.

Mr. Lang, I know you don't have anything to say in [14] disagreement to that.

MR. LANG: I have nothing to say, your Honor.

THE COURT: So I find that, as I said earlier, that the total offense level is a Level 16, the criminal history category is a Category 5.

But for the mandatory minimum of ten years, I would have sentenced Mr. Hill, considering the 3553 factors, to a sentence at the high end of the guideline range of 51 months. He would have been considered a serious trafficker if the statute were to be applied retroactively, and I would have been required to impose a sentence of 60 months.

Any other disputed issues that we have to resolve?

MR. EBERHARDT: No. I just bring up, Judge, that Mr. Hill has some family members who would like to address the Court.

THE COURT: Good afternoon all.

MR. EBERHARDT: And Mr. Hill would like to address the Court.

THE COURT: All right. Do you want to call them up as you wish, Mr. Eberhardt?

Can I also say, just for the record – I think I brought this up before. I've read now several times your letter, Mr. Hill, to me. The envelope was dated back in, I think, January of this year – yes, January 23rd. I've read it and I've considered everything you had to say in there.

[15] THE DEFENDANT: Okay.

THE COURT: Okay. Good afternoon.

MS. WRIGHT: Good afternoon. My name is Juanita Wright. I'm the mother of Corey Hill's child. And I just would like to say that I need for my baby here to get out of jail because I have health problems. I have a heart problem, I have mental illness – I have a mental illness, and with him being gone, it's like – it's hard raising three kids all by myself. It's like – every day is like a struggle for me, and it's like – I just need somebody there to help me. And that's all I got to say.

THE COURT: Thank you.

MS. COOKE: Good afternoon, Judge.

THE COURT: Would you say your name, please?

MS. COOKE: My name is Bridget Cooke. I'm Corey's mom.

THE COURT: Good afternoon, Ms. Cooke.

MS. COOK: Thank you.

Well, I'm here to say that, as you can see, if you read his letter, you know that he's smart; he's an intelligent child.

THE COURT: I believe you are, Mr. Hill.

MS. COOKE: Yes. And I just want you to have a little leniency on him because he do have not just one, he have two children. Corey, Jr., he sent you a letter back a [16] few months ago, but I think he sent it to the wrong address. I'm not sure –

THE COURT: Do you have a copy of that now?

MS. COOKE: No, I didn't.

THE COURT: I don't see a letter.

Do you have that, Mr. Eberhardt?

MR. EBERHARDT: Judge, I thought the letters were –

THE COURT: Is that the one I just referred to or –

MR. EBERHARDT: I recall – I thought probation had a letter from Corey Hill, Jr., Judge. I don't have it with me right now.

THE COURT: Well, I may have read it in the past. I don't have it –

PROBATION OFFICER: Your Honor, I don't believe I have any letters from his son.

THE COURT: Okay. Well, if you had a copy –

MS. COOKE: No, I didn't have a copy. But in the letter he stated that he's 13 now and it seems like he's getting in more trouble, going down maybe the same road, and he needs his dad. And that's what he was trying to write to you and tell you.

I have health problems, too, and so, therefore – sometimes I have him when his mom can't control him. I can't [17] either. He need his dad.

So that's all I have to say. He needs to be home for that.

THE COURT: Thank you, Ms. Cooke.

MS. COOKE: You're welcome.

THE COURT: Good afternoon. Could you say your name, please?

MS. HILL: Shacorey Hill.

THE COURT: Say it one more time.

MS. HILL: Shacorey Hill.

THE COURT: Shacorey.

MS. HILL: I want my daddy to come home because I miss him and I want him to be there because I need him.

THE COURT: Thank you.

MS. BEVERLY: Good afternoon, Judge. My name is Yolanda Beverly. I'm Corey Hill's little sister.

THE COURT: Good afternoon, Ms. Beverly.

MS. BEVERLY: Since my brother got locked up I haven't seen my brother. I don't like to see him like this.

I have two brothers and I'm 29 years old. All my life I've only had my mom and my two brothers because we didn't have a dad around. I know a lot of the things my brother did was wrong, but I'm a mother of three and I'm also a wife. My mom is very sick. My mom depends on me a lot and it's taken a toll on me. I'm not saying forgive my brother [18] for everything he's done. I'm just asking for a little lenience on him.

I need help. My marriage is falling apart because I'm always running for my mom back and forth from the hospital, but I tell my husband that's all I've ever had. So to leave her by herself, I can't, because they never left me.

As my mom said, times are getting hard. My brother needs to be home with his kids. I can't be there every step of the way, and I have two girls and a son of my own that I'm trying hard to raise. Working two jobs is very, very hard. I tell my mom I can't be here all the time, but I know she needs me, so I try.

Judge, I'm asking that you send my brother home so that he can save my nephew's life, because he's not going down the right path. And it seems like with him home, he's so controllable. I wish I would have brought his progress reports from when his dad was home. He was a straight A student until he left and now it just seems like he's showing out because he's not here for that discipline. He doesn't have a dad in his life.

I don't want to see my nephew here, I don't want to speak on his behalf, and I don't want to bury him. We've lost so many family members this year. My great grandmother passed and he was not here, which is one of her favorites, and we always tease him that that's her favorite. And she's [19] gone now; we don't have her.

Please help my brother save his son's life, please. Thank you.

THE COURT: Thank you.

Mr. Eberhardt?

MR. EBERHARDT: Judge, I believe that's all for the family members.

THE COURT: All right. Do you have anything else to offer, Mr. Eberhardt, as far as testimony?

MR. EBERHARDT: Just Mr. Hill, Judge.

THE COURT: We'll do that in allocution.

Do you want to make some comments regarding sentencing, Mr. Eberhardt?

MR. EBERHARDT: Judge, I don't know what more to say. I think we're stuck. I know this is a very difficult position for your Honor and the courts generally to be in. That's why – and I also realize the binding precedent in the Seventh Circuit on district court judges around these three states.

All I can say, Judge, is obviously I think that Judge Hornby's position would give the Court enough latitude to make a finding and let the Seventh Circuit review it. But I realize where the Court is at, Judge.

THE COURT: Thank you, Mr. Eberhardt.

Mr. Lang?

[20] MR. LANG: Nothing, your Honor.

THE COURT: Mr. Hill, you have the absolute right to continue to remain silent. You have an absolute right to speak, the right of allocution that's afforded anyone facing a sentence in a federal criminal courtroom.

Is there anything you would like to say?

THE DEFENDANT: Yes, your Honor.

I have put some things together to address the Court today.

Before I proceed I would like to apologize to my family and my loved ones for the pain and suffering they endured through my incarceration. I would also like to apologize to the courts and fellow Americans for my participation in crime.

I have many regrets and I am shameful for my actions. It's kind of hard for me sitting here watching my daughter, and my mother, my baby's mother and my sister come up here crying and pleading for my life.

I had more to say but it's hard for me to speak, so I just leave it with that. Thank you.

THE COURT: Thank you.

Pronouncing a sentence on another person, another human being, is probably the most difficult part of this job, but it's part of the obligation that I assumed when I became a judge.

[21] The United States Congress has given me some direction as to how a sentence should be considered and what kind of a sentence should be imposed. I'm obligated to impose a sentence that is necessary but not greater than necessary to provide just punishment, adequate deterrence, protection to the public and any needed training or treatment. And in doing that, I'm directed to consider certain factors.

I'm supposed to consider the nature and history of the offense. Mr. Hill, we've debated the intricacies of the federal sentencing laws and the policies behind them and whether or not a mandatory sentence is appropriate in this case or required in this case or whether it's not. But that should not obscure the fact that your conduct, the conduct that you participated in, the distribution of drugs, possesses a real threat to our society, particularly the people in your own community. And it appears that you were doing this for the simplest and most basic of all reasons, and that is for some money. So when you consider the nature and history of the offense, this conduct is serious.

Your sister commented a moment ago about the risk that your son faces growing up without you present, and that certainly is a very real thing and something I'm going to comment on in a moment. But, on the other hand, your conduct put people like your son and others close to his age in [22] jeopardy by dealing drugs in that community, and I hope that's something you reflect upon during the rest of your life.

I'm also directed to consider the history and characteristics of you. You are 31 years old?

THE DEFENDANT: Yes, sir.

THE COURT: You amassed a major criminal history on this point. I mean, you've been in and out of jail – or in and out of the courts since you were a very young man. And that's something that I'm required to consider as well.

I'm also to consider the sentencing guidelines. And the guidelines in this case, as I determine them to be, would require a sentence not to exceed 51 months if the guidelines were to be followed. And that's something that I will consider as well.

I am to consider the kinds of sentences available, any training or treatment that you require, and any policy statements that have been promulgated regarding the offense that you stand convicted of. And we've considered the statements made by the United States Attorney General and the like regarding the crack cocaine sentencing laws. To the extent that

that's what 3553 contemplates, I certainly considered all of that.

On the plus side of the ledger, considering your own personal history and characteristics, and imposing a [23] sentence that will provide adequate deterrence to you as well as adequate deterrence to other people that are similarly inclined to commit these kind of offenses, I do recognize some growth on your part. The fact that you've achieved a high school diploma while you have been incarcerated is something that argues very favorably for you. And your mother – your sister pointed out that you're not a dumb fellow, and I agree with that. You're obviously a very bright guy.

In addition, I've considered the extreme hardship to your family, particularly your child, and – or your children, who will be without the assistance of their father during their formative years, the impact that your incarceration will have on your mother and your sister. Those are certain things that I would consider as well.

Mr. Eberhardt hit it on the head. The Seventh Circuit has rendered an opinion that requires me to sentence you to a term of at least 120 months.

So based on that rule of law, which I'm obligated to follow, pursuant to the Sentencing Reform Act of 1984, it is the judgment of this Court that you're committed to the custody of the Bureau of Prisons for a term of 120 months.

I recommend to the Bureau of Prisons that you participate in a comprehensive drug and alcohol treatment program.

[24] Because of your financial condition, no fine or cost of imprisonment or supervised release shall be imposed. However, you shall pay a special assessment of $100, which is payable and due immediately.

Upon release from prison, you shall be placed on a period of supervised release for a term of ten years. Within 72 hours of release from the custody of the Bureau of Prisons, you shall report in person to the probation office in the district where you are released.

While on supervised release you shall not commit any other federal, state or local crimes.

You shall comply with the standard conditions that have been adopted by this Court.

You shall refrain from the unlawful use of a controlled substance.

You shall submit to one drug test within 15 days of release from prison and random drug tests thereafter, not to exceed 104 tests per year.

You shall not possess a firearm or other destructive device.

You shall cooperate in the collection of a sample of DNA from your body, if required by statute, at the direction of the probation officer to whom you are assigned.

You shall participate in a drug aftercare and alcohol aftercare treatment program at the discretion and [25] direction of the probation officer to whom you are assigned.

You shall also participate in a mental health treatment program at the direction of the probation officer to whom you are assigned and take any medications that are prescribed.

I also recommend to the Bureau of Prisons that you be evaluated, that your mental health be evaluated and that you be afforded the opportunity to participate in any mental health treatment programs the Bureau of Prisons has to offer as well.

You shall pay $1,300 to the Bureau of Alcohol, Tobacco, Firearms & Explosives as compensation for funds that you received during the investigation of this case.

Upon completion of your term of imprisonment, the balance of any financial obligation shall become a condition of supervised release, and you shall make monthly payments of at least ten percent of your net monthly income.

Mr. Hill, you can appeal your conviction if you believe that there were any errors that were committed during your trial. You also can appeal your sentence if you believe your sentence was contrary to the law.

You may apply to appeal in what the law calls in forma pauperis. That means that if you qualify, the cost of preparing and filing an appeal will be waived.

The Clerk of the Court will prepare and file a [26] notice of appeal upon your request. With very few exceptions, any notice of appeal must be filed within 14 days of the entry of this judgment.

Do you understand what I've just said, sir?

THE DEFENDANT: Yes, sir.

THE COURT: Mr. Eberhardt, I direct you to consult with Mr. Hill. If it's his intention to file a notice of appeal, I'll ask you to assist him in doing so.

MR. EBERHARDT: Judge, we have discussed that and there will be one filed.

THE COURT: All right.

Mr. Hill, you made some very serious mistakes in your life and I think probably by this time you're starting to recognize that. And, unfortunately, the conduct that you've committed has effects not only on yourself but on people that you hold very dear to you. You're going to pay for those mistakes for, unfortunately, a significant amount of time.

On the other hand, you're a young man and you have the advantage of having people that love and support you. I really urge you to take this period in your life, reflect on where you've been and where you could be in a positive fashion and how you could make some contribution to these people that have supported you.

Good luck to you, sir.

[27] THE DEFENDANT: All right.

THE COURT: Is there a recommendation, Mr. Eberhardt?

MR. EBERHARDT: No, Judge.

MR. LANG: Thank you, your Honor.

THE COURT: Good to see you both.

(Which were all the proceedings heard.)

[Certificate Of Court Reporter Omitted In Printing]

JUDGMENT AND COMMITMENT

UNITED STATES DISTRICT COURT
Northern District of Illinois, Eastern Division

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	CASE NUMBER: **08 CR 486-1**
Corey A. Hill	USM Number: **22609-424**
	Stephen E. Eberhardt Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) ________

☐ pleaded nolo contendere to count(s) ________ which was accepted by the court.

☒ was found guilty on count(s) one of the indictment. after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21 USC 841(a) and 846 and 851(a)	Possession with intent to distribute crack cocaine	3/2007	One

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ____________________

X Count(s) any remaining counts ☐ is X are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

12/2/2010
Date of Imposition of Judgment

/s/ John W. Darrah
Signature of Judge

John W. Darrah, U.S. District Court Judge
Name and Title of Judge

12/7/2010
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

120 months on count one of the indictment. The costs of incarceration are waived.

X The court makes the following recommendations to the Bureau of Prisons:

The defendant shall participate in a residential treatment program for drug and alcohol abuse (RDAP). The defendant shall be evaluated, receive treatment and participate in a treatment program for mental health.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ________ ☐ a.m. ☐ p.m. on ____________.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on ____________________________.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on ________ to ___________
a _____________, with a certified copy of this judgment.

____
UNITED STATES MARSHAL

By _____________________________
DEPUTY
UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 10 years on count one of the indictment. The costs of supervision are waived. The defendant shall participate in a drug and alcohol aftercare treatment program and a mental health treatment program as directed by the probation office.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and drug test thereafter, conducted at the discretion of the United States Probation Office, not to exceed 104 test per year.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall comply with the requirements of Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not

associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

ADDITIONAL SUPERVISED RELEASE TERMS

The defendant shall pay $1,300, to the Bureau of Alcohol, Tobacco, Firearms, and Explosives, 525 W. Van Buren Street, Suite 600, Chicago, Illinois, 60607, as compensation for government funds that the defendant received during the investigation.

Upon completion of the defendant's term of incarceration, the balance of any financial obligation shall become a condition of supervised release, and that the defendant's monthly payment schedule is at least 10% of his net monthly income.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00		

☐ The determination of restitution is deferred until ______. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amount listed below.

☐ If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Bureau of Alcohol, Tobacco, Firearms & Explosives 525 W. Van Buren Chicago, Illinois 60607 Compensation for government funds that the defendant received during the investigation of the case	$1,300		

TOTALS: $ 1,300 $ ________

☐ Restitution amount ordered pursuant to plea agreement $ ______________________.

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

☐ the interest requirement is waived for the
☐ fine ☐ restitution.

☐ The interest requirement for the
☐ fine ☐ restitution is modified as follows:

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☐ Lump sum payment of $ ______ due immediately, balance due

☐ not later than ______________ , or
☐ in accordance ☐ C, ☐ D, ☐ E or, ☐ F below; *or*

B X Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ E, or ☐ F below); or

C ☐ Payment in equal _______ *(e.g., weekly, monthly, quarterly)* installments of ______ over a period of ________ *(e.g., months or years)*, to commence *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal ________ *(e.g., weekly, monthly, quarterly)* installments of _____ over a period of ____________ *(e.g., months or years)*, to commence _____________ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment; (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

7

DENIAL OF DEFENDANT'S MOTION TO RECONSIDER

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	John W. Darrah		
	Sitting Judge if Other than Assigned Judge		
CASE NUMBER	08 CR 486-1	**DATE**	12/9/10
CASE TITLE	United States v. Corey Hill		

DOCKET ENTRY TEXT

Defendant's motion to reconsider [99] is denied.

■ [For further detail see text below.]

Docketing to mail notices.

STATEMENT

On December 2, 2010, the Court sentenced Defendant to the mandatory minimum of 120 months' imprisonment for possession with intent to distribute crack cocaine. Before the Court is Defendant's Motion to Reconsider. Defendant argues, as he did at sentencing, that the ten-year mandatory minimum should not apply due to the recent passage of the Fair Sentencing Act ("FSA"). The Court found that under the controlling precedent of *United States v. Bell,* 624 F.3d 803 (7th Cir. 2010), the FSA does not apply retroactively and, thus, did not affect the mandatory minimum in this case. Defendant's motion does not affect the conclusion that *Bell* is controlling. Therefore, Defendant's motion is denied.

SEVENTH CIRCUIT ORDER OF APRIL 7, 2011

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

Submitted April 6, 2011*
Decided April 7, 2011

Before

JOEL M. FLAUM, *Circuit Judge*

DIANE P. WOOD, *Circuit Judge*

DAVID F. HAMILTON, *Circuit Judge*

No. 10-3837

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, *v.* COREY A. HILL, *Defendant-Appellant*.	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division. No. 08 CR 486-1 John W. Darrah, *Judge*.

---

* After examining the briefs and the record, we have concluded that oral argument is unnecessary. Thus, the appeal is submitted on the briefs and the record. *See* FED. R. APP. P. 34(a)(2)(C).

ORDER

(Filed April 7, 2011)

The Fair Sentencing Act of 2010, which took effect on August 3, 2010, raised from 50 to 280 grams the amount of crack cocaine necessary to trigger a statutory minimum term of imprisonment of 10 years, and from 5 to 28 grams the amount needed to trigger a minimum term of 5 years. *See* Pub. L. No. 111-220, § 2(a), 124 Stat. 2372, 2372 (2010); 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii).

In 2009, a jury found Corey Hill guilty of possessing 50 or more grams of crack with intent to distribute. *See* 21 U.S.C. § 841(a)(1). At sentencing, in December 2010, the district judge relied on our decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), *petition for cert. filed*, ___ (U.S. Mar. 4, 2011) (No. 10-9409), and concluded that the Fair Sentencing Act did not apply retroactively to Hill. The judge thus sentenced Hill to 120 months in prison, which was the statutory minimum because his offense was committed before the Act took effect. The judge noted, however, that he would have imposed a term of 51 months if not for the statutory minimum.

Hill's only argument on appeal is that the Fair Sentencing Act should apply to any defendant sentenced after its enactment, even if the underlying crime was committed before. That, he contends, was Congress's intent, as evidenced by the language of the Act and its legislative history. For Hill, that would have meant a minimum of 5 years, not 10. But we recently rejected the same argument in *United States* *v. Fisher*, Nos. 10-2352 & 10-3124, 2011 WL 832942, at *3 (7th Cir. Mar. 11, 2011), where we reaffirmed our holding in *Bell* that the Fair Sentencing Act does not apply retroactively and added that the relevant date for determining whether the Act applies is the date of the offense conduct, rather than the date of sentencing.

Accordingly, we AFFIRM the judgment of the district court.

ORDER GRANTING IFP AND CERTIORARI

Monday, November 28, 2011

11-5683) DORSEY, EDWARD V. UNITED STATES

11-5721) HILL, COREY A. V. UNITED STATES

The motions of petitioners for leave to proceed *in forma pauperis* are granted. The petitions for writs of certiorari are granted. The cases are consolidated and a total of one hour is allotted for oral argument.

PETITIONER'S
BRIEF

RECORD
AND
BRIEFS

No. 11-5721

In The
Supreme Court of the United States

◆

COREY A. HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Seventh Circuit**

◆

BRIEF FOR PETITIONER

◆

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QUESTION PRESENTED

Whether the district court erred in not sentencing Petitioner pursuant to the Fair Sentencing Act of 2010 ("the FSA"), where Petitioner was sentenced on December 2, 2010, after the effective date of the FSA and the amendments to the Sentencing Guidelines mandated by the FSA?

LIST OF PARTIES

There are no additional parties to the proceeding other than those listed in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 14

ARGUMENT 16

- I. CONGRESS INTENDED THE FSA TO APPLY TO ALL INITIAL SENTENCING PROCEEDINGS OCCURRING AFTER ITS ENACTMENT 16
  - A. Immediate Application Of The FSA Is Consistent With Its Statutory Text 17
    - 1. The FSA Applies At Least To Defendants Sentenced On Or After August 3, 2010 17
    - 2. The FSA Undoubtedly Applies To Defendants Sentenced On Or After November 1, 2010 25
  - B. Immediate Application Of The FSA Is Consistent With Its Legislative History And Purpose 26

TABLE OF CONTENTS – Continued

Page

II. THE SAVING STATUTE DOES NOT CONTROL BECAUSE CONGRESS FAIRLY IMPLIED THAT THE FSA APPLIES IMMEDIATELY 31

CONCLUSION 39

APPENDIX

Fair Sentencing Act of 2010 .... App. 1

Relevant Portions of 21 U.S.C. § 841 Before Enactment of the FSA .... App. 10

Relevant Portions of 21 U.S.C. § 841 After Enactment of the FSA .... App. 23

Relevant Portions of Sentencing Guidelines Before Enactment of the FSA .... App. 36

Relevant Portions of Sentencing Guidelines After Enactment of the FSA .... App. 60

Saving Statute, 1 U.S.C. § 109 .... App. 88

Letter from Senators Durbin and Leahy to Attorney General, November 17, 2010 .... App. 89

Attorney General's Memorandum, July 15, 2011 .... App. 93

TABLE OF AUTHORITIES

Page

CASES

Abbott v. United States, 131 S. Ct. 18 (2010) 22

Clark v. Martinez, 543 U.S. 371 (2005) 38

Dean v. United States, 129 S. Ct. 1849 (2009) 37

Fletcher v. Peck, 10 U.S. 87 (1810) 33

Graham v. Goodcell, 282 U.S. 409 (1931) 17

Great N. Railway Co. v. United States, 208 U.S. 452 (1908) 32

Hamm v. City of Rock Hill, 379 U.S. 306 (1964) 30, 31

Harris v. United States, 536 U.S. 545 (2002) 24

Hertz v. Woodman, 218 U.S. 205 (1910) 32

Johnson v. United States, 529 U.S. 694 (2000) 22

Jones v. United States, 526 U.S. 227 (1999) 38

Kimbrough v. United States, 552 U.S. 85 (2007) 4, 5, 23

Koon v. United States, 518 U.S. 81 (1996) 24

Ladner v. United States, 358 U.S. 169 (1958) 36

Landgraf v. USI Film Prods., 511 U.S. 244 (1994) 35, 36

Lockhart v. United States, 546 U.S. 142 (2005) 33

Marcello v. Bonds, 349 U.S. 302 (1955) 33, 34, 35

Pepper v. United States, 131 S. Ct. 1229 (2011) 19

Russello v. United States, 464 U.S. 16 (1983) 27

Simpson v. United States, 435 U.S. 6 (1978) 37

Page

Spears v. United States, 555 U.S. 261 (2009) 4

United States v. Bell, 624 F.3d 803 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2121 (2011) 10

United States v. Bryson, 229 F.3d 425 (2d Cir. 2000) 20

United States v. Dunnigan, 507 U.S. 87 (1993) 20

United States v. Fisher, 635 F.3d 336 (7th Cir. 2011), *cert. denied*, ___ S. Ct. ___, 2011 WL 3812692 (U.S. Nov. 28, 2011) 10

United States v. Granderson, 511 U.S. 39 (1994) 36

United States v. Gully, 619 F. Supp. 2d 633 (N.D. Iowa 2009) 9

United States v. Hill, 417 Fed. App'x 560 (7th Cir. 2011) 1

United States v. Holcomb, 657 F.3d 445 (7th Cir. 2011) ....*passim*

United States v. R.L.C., 503 U.S. 291 (1992) 36

United States v. Rollins, No. 08-cr-1014-5 (N.D. Ill. 2010) 9

United States v. Rutherford, 442 U.S. 544 (1979) 13

United States v. St. Louis, S.F. & T.R. Co., 270 U.S. 1 (1926) 32

United States v. Tynen, 78 U.S. 88 (1870) 32

United States v. Yermian, 468 U.S. 63 (1984) 27

TABLE OF AUTHORITIES – Continued

Page

Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653 (1974) 33

Wasman v. United States, 468 U.S. 559 (1984) 20

STATUTES

1 U.S.C. § 109 ....*passim*

18 U.S.C. § 3282(a) 21

18 U.S.C. § 3553(a) 10

18 U.S.C. § 3553(a)(2) 37

18 U.S.C. § 3553(a)(4)(ii) 19

18 U.S.C. § 3661 20

21 U.S.C. § 841(a) 1

21 U.S.C. § 841(b) 1, 10

21 U.S.C. § 841(b)(1)(A)(iii) 5, 7

21 U.S.C. § 841(b)(1)(B)(iii) 5, 7

28 U.S.C. § 994 note 6, 7

28 U.S.C. § 994(p) 7, 18, 23

28 U.S.C. § 1254(1) 1

Anti-Drug Abuse Act of 1986 ....4, 30

Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 314(c)(2) 19

Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. No. 110-179, § 5(c) 19

Page

Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) .... *passim*

Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6703(b) 19

Sentencing Act of 1987, § 21(a) 6

SENTENCING GUIDELINES

U.S.S.G. App. C, Amend. 750 (effective Nov. 1, 2011) 8, 23

U.S.S.G. App. C, Amend. 748 (effective Nov. 1, 2010) 7, 22, 23

U.S.S.G. App. C, Amend. 759 (effective Nov. 1, 2011) 8

U.S.S.G. § 1B1.11 19

U.S.S.G. § 2D1.1 .... 2, 8

U.S.S.G. § 2D1.1(c) 7

LEGISLATIVE MATERIALS

155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) 24, 29

155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) 24, 28, 29, 30, 39

155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) 27, 29

156 Cong. Rec. H6197 (daily ed. July 28, 2010) 5, 29

156 Cong. Rec. H6198 (daily ed. July 28, 2010) 38

TABLE OF AUTHORITIES – Continued

Page

156 Cong. Rec. H6203 (daily ed. July 28, 2010) 28

156 Cong. Rec. S1680-81 (daily ed. Mar. 17, 2010) 26, 27

156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010) 27, 28

156 Cong. Rec. S10491-92 (daily ed. Oct. 15, 2009) 24

H.R. 265 § 11, 111th Cong. (2009) 27

H.R. 4545 § 11, 110th Cong. (2007) 27

S. 1383 § 204(b), 110th Cong. (2007) 27

S. 1711 § 11, 110th Cong. (2007) 27

S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983) 19

OTHER AUTHORITIES

Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 272, tbl. D-10 (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx (last visited Jan. 24, 2012) 21

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. Hill*, 417 Fed. App'x 560 (7th Cir. 2011), and is reproduced at JA 97. The judgment of the United States District Court for the Northern District of Illinois is unreported and is reproduced at JA 83.

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STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 2011. JA 4. Petitioner timely filed his petition for a writ of certiorari on July 11, 2011. This Court granted the petition on November 28, 2011. JA 100. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), is reproduced in the appendix to this brief at App. 1. The Fair Sentencing Act amended certain provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act and issued related directives to the United States Sentencing Commission.

Relevant portions of 21 U.S.C. § 841(a) and (b), both before and after their amendment by the Fair

Sentencing Act, are reproduced in the appendix to this brief at App. 10 and App. 23.

Relevant portions of the Sentencing Guidelines, U.S.S.G. § 2D1.1, both before and after their amendment pursuant to the Fair Sentencing Act, are reproduced in the appendix to this brief at App. 36 and App. 60.

The Saving Statute, 1 U.S.C. § 109, is reproduced in the appendix to this brief at App. 88.

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STATEMENT OF THE CASE

This case presents the question whether thousands of defendants charged with crack-cocaine offenses nationwide will be subject to repealed mandatory minimum sentences that Congress has declared to be unfair. Its resolution depends on a proper interpretation of the Fair Sentencing Act of 2010 (the "FSA" or the "Act"), a watershed bipartisan response to mounting criticism of the 100:1 crack-to-powder ratio that was 25 years in the making. Born of a desire to restore fairness and eliminate potentially racially disparate sentences, the Act reduces the crack-to-powder ratio to 18:1 by increasing the amounts of crack that trigger mandatory minimum terms, and urgently directs the Commission to promulgate conforming Guidelines.[2] As demonstrated by its text, purpose, and legislative history, the FSA applies immediately to all sentencing proceedings following its enactment.

Petitioner Corey Hill was sentenced after the effective dates of both the FSA and the amended Guidelines that implemented it. JA 56. While the Act would have required him to receive a mandatory minimum sentence of 5 years, the district court doubled his sentence to 10 years based on the mandatory minimum provisions of the repealed law. JA 69. The Seventh Circuit, bound by its earlier precedent, affirmed. JA 98-99. Ignoring the clear mandate of the FSA, the court determined that the amendments made by Congress to make sentencing more fair did not apply because Petitioner's offense conduct occurred prior to the passage of the Act. JA 98-99. The court erroneously concluded that the Saving Statute, 1 U.S.C. § 109, required the continued application of the repealed law by default, even though all indications were that Congress intended to supplant that law immediately. JA 98-99.

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[2] The crack-to-powder ratio compares the amount of crack versus powder cocaine necessary to trigger a mandatory minimum sentence. Under prior law, the sale of 5 grams of crack resulted in the same mandatory minimum sentence (5 years) as 500 grams of powder cocaine, hence the 100:1 ratio. Under the FSA, the same mandatory minimum for the sale of 500 grams of powder cocaine now requires the sale of 28 grams of crack, for a ratio of 18:1.

The issues presented in this case arise in the wake of *Kimbrough v. United States*, 552 U.S. 85 (2007), which confirmed that district judges had authority to vary from the 100:1 crack-to-powder ratio contained in the Guidelines of that time based solely on a disagreement with the policy underlying that ratio. The Court traced the decades-long criticism of the 100:1 ratio, which originated in the mandatory minimum provisions of the Anti-Drug Abuse Act of 1986, echoing the reasons articulated by the Sentencing Commission in a series of research reports to Congress. The Court explained that sentencing judges were not bound to impose the uniquely severe sentences for crack offenses reflected in those Guidelines, because they (1) rested on assumptions about the relative harmfulness of crack versus powder cocaine that more recent research no longer supported; (2) resulted in sentencing disparities between crack- and powder-cocaine offenders that were inconsistent with the goal of punishing major drug traffickers more severely than low-level dealers; and (3) fostered disrespect for and lack of confidence in the criminal justice system because of a widely held perception that the ratio had a racially discriminatory impact. *Id.* at 97-98; *see also Spears v. United States*, 555 U.S. 261, 265-66 (2009).

This case presents the next chapter after *Kimbrough*. In the face of withering criticism of the 100:1 ratio, Congress in the FSA addressed the need for more just sentencing by imposing an 18:1 ratio for mandatory minimum sentences, and directed the

Commission to issue new conforming Guidelines to achieve consistency immediately. The application of the repealed mandatory minimums to Petitioner and other similarly situated offenders undoes Congress's effort to remedy the very problems identified in *Kimbrough*.

1. On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010 (Pub. L. No. 111-220, 124 Stat. 2372 (2010)), the stated purpose of which was to "restore fairness to Federal cocaine sentencing." *Id.* To achieve that purpose, the FSA amended certain provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act and issued several related directives to the Sentencing Commission. App. 1-9. Congress passed those amendments in the Senate by unanimous consent and in the House by a voice vote. 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Scott).

In a section entitled "Cocaine Sentencing Disparity Reduction," the FSA increased the threshold quantities of crack that trigger application of certain mandatory minimum terms of imprisonment. FSA § 2, 124 Stat. at 2372. It raised the amount of crack that triggers a mandatory 120-month minimum term of imprisonment from 50 grams to 280 grams (21 U.S.C. § 841(b)(1)(A)(iii)) and the amount that triggers a 60-month minimum term of imprisonment from 5 grams to 28 grams (*id.* § 841(b)(1)(B)(iii)). App. 1. The effect of these increases was to change the weight ratio of cocaine powder to crack, for the purpose of imposing mandatory minimum sentences, from 100:1 to 18:1.

The FSA also recalibrated the sentencing scheme for drug-trafficking offenders to distinguish among the relative culpabilities of crack offenders overall. The FSA increased monetary fines for major drug traffickers (FSA § 4, 124 Stat. at 2372-73), and directed the Commission to account for certain aggravating factors, such as for a violent offender acting as an organizer who sells crack to a minor or the elderly (FSA § 6, 124 Stat. at 2373-74). At the same time, it eliminated the mandatory minimum sentence for simple possession of crack (FSA § 3, 124 Stat. at 2372), and directed the Commission to account for certain mitigating factors, such as for an offender with a minimal role who is motivated by fear or a family relationship to sell for no compensation (FSA § 7, 124 Stat. at 2374). App. 2-7.

The directives to the Commission were accompanied by a grant of "emergency authority" and a mandate to do the following:

> (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

> (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

FSA § 8, 124 Stat. at 2374. App. 7.

Section 21(a) of the Sentencing Act of 1987 granted the Commission the authority to promulgate a temporary Guideline or amendment to an existing Guideline when the need to do so is "urgent and compelling." 28 U.S.C. § 994 note. That authority, unless otherwise resurrected by Congress, expired on May 1, 1988. *Id.* The procedure outlined in the 1987 Act contrasts sharply with the procedures that the Commission must ordinarily follow to amend the Guidelines. The latter require the submission of the amendments promulgated by the Commission to Congress, along with a statement of the reasons therefor, to take effect no sooner than 180 days later. 28 U.S.C. § 994(p).

Pursuant to § 8 of the FSA, the Commission drafted an emergency, temporary amendment to six Guidelines provisions, effective November 1, 2010. U.S.S.G. App. C, Amend. 748. Consistent with § 2 of the FSA, the temporary amendment increased the quantities of crack cocaine enumerated in the Drug Quantity Table, U.S.S.G. § 2D1.1(c), to reflect the increased quantities codified in 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii) pursuant to the FSA. *Id.* The Commission then conformed the Guidelines to reflect the new 18:1

ratio proporionately throughout the Drug Quantity Table, as well as the aggravating and mitigating factors identified by Congress. It later re-promulgated this portion of the temporary amendment, without change, as a permanent amendment, effective November 1, 2011. U.S.S.G. App. C, Amend. 750.[2] App. 60.

The Commission was also directed to prepare a report to Congress regarding the impact of FSA no later than five years after the date of its enactment. FSA § 10, 124 Stat. at 2375. App. 9.

2. Petitioner was arrested on June 19, 2008, and charged with one count of distributing more than 50 grams of crack on or about March 28, 2007. JA 6. On April 22, 2009, following a jury trial, he was found guilty of the charged offense. JA 1. His sentencing, however, did not occur until after the FSA was signed into law on August 3, 2010. JA 56.

3. On December 2, 2010 – almost four months after passage of the FSA, and one month after the new "conforming" Guidelines took effect – Petitioner was sentenced. JA 56. The main legal question before the district court was the applicability of the FSA. JA 59-68.

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[2] On June 30, 2011, the Commission voted unanimously to apply this portion of the amendment retroactively to all eligible individuals previously sentenced under § 2D1.1 for a crack-cocaine offense. U.S.S.G. App. C, Amend. 759. That rule took effect on November 1, 2011.

At an earlier proceeding, the district court had determined that it was appropriate to apply the Guidelines to Petitioner as if the crack-to-powder ratio were 1:1. JA 49. The court adopted its rationale from another case, in which it had expressed numerous reasons for rejecting the 100:1 ratio then in effect in favor of a 1:1 ratio: (1) the 100:1 ratio was the result of a "legislatively enacted weight-driven scheme rather than the Commission's usual empirical approach"; (2) the 100:1 ratio depended on assumptions about the relative harmfulness of crack and cocaine powder "that are no longer supported by the evidence"; (3) the 100:1 ratio is inconsistent with punishing major drug traffickers, who deal with powder cocaine, more severely, and low-level crack dealers, who convert cocaine powder into crack, less severely; and (4) the disproportionate impact on black offenders resulting from the use of the 100:1 ratio "fosters disrespect for and lack of confidence in the criminal justice system." *United States v. Rollins*, No. 08-cr-1014-5 (N.D. Ill. 2010) (citing *United States v. Gully*, 619 F. Supp. 2d 633, 638-39 (N.D. Iowa 2009)). JA 52-53.

The district court found that the amount of crack involved in Petitioner's offense was 53.3 grams. Applying the 1:1 ratio, it determined that Petitioner had an offense level of 16 and a criminal history category of V, resulting in an advisory Guidelines range of 41-51 months. JA 58-59. The district court announced that if it had the discretion to do so, it would have sentenced Petitioner at the high end of that Guidelines range. JA 69.

The district court then considered the impact of the FSA. JA 59-60. At sentencing, the government argued that the Saving Statute, 1 U.S.C. § 109, required the continued imposition of the now-repealed mandatory minimum term because Petitioner's offense conduct occurred prior to the FSA's passage, and the date of that conduct controlled which penalty applied. JA 61. Relying on the Seventh Circuit's decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), *cert. denied*, 131 S. Ct. 2121 (2011), the district court agreed. JA 62-63. Notwithstanding the much lower sentence it considered to be "sufficient, but not greater than necessary," based on its consideration of the relevant sentencing factors under 18 U.S.C. § 3553(a), the district court held it was required to apply the old mandatory minimum sentence under the pre-FSA version of 21 U.S.C. § 841(b), and it accordingly imposed a sentence of 120 months. JA 78.

4. In a short per curiam opinion, decided on the briefs without oral argument, the Seventh Circuit affirmed. JA 97-99. Adhering to its earlier decisions, the Seventh Circuit held that the FSA did not apply to Petitioner because his offense conduct predated the passage of the Act, even though his sentencing did not occur until months after. *Id.* (citing *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011), *cert. denied*, ___ S. Ct. ___, 2011 WL 3812692 (U.S. Nov. 28, 2011)).

5. A few months later, while Petitioner's petition for a writ of certiorari was pending before this Court, the Justice Department changed its position on the applicability of the FSA to cases where the sentencing occurs after passage of the Act. App. 93. While contending that the Saving Statute precludes application of the new mandatory minimum provisions to defendants already sentenced before the enactment of the FSA, the Justice Department concluded that those provisions should apply to all sentencings that occur on or after August 3, 2010, regardless of when the underlying offense conduct took place.[3] The Attorney General explained in a written memorandum that "[t]he goal of the [FSA] was to rectify a discredited policy," and that "Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law." App. 96. As a result, the United States confessed error in this case and indicated that it would file a brief supporting reversal.

6. In the wake of the Justice Department's about-face, the Seventh Circuit considered whether it

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Thereafter, numerous United States Attorney's Offices filed "Notices of Changed Position" in pending cases and appeals in which the United States had previously taken the position that the FSA's amendments did not apply to conduct that occurred prior to August 3, 2010, even if the sentencings in those cases and appeals occurred on or after August 3. The Notice stated that the government now believed that the FSA should apply to those defendants.

should revisit its decision on the applicability of the FSA to cases where sentencing had not yet occurred at the time of its enactment. Five judges voted to rehear one such case en banc, while another five voted against, with each side producing one or more lengthy opinions. *See United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011) (denying petition for rehearing).

Writing for the five judges who opposed rehearing, Chief Judge Easterbrook focused on the effect of the Saving Statute. *Id.* at 446. Although he acknowledged that § 109, which was passed in 1871, could not bind a later Congress, he found no implication in the FSA that Congress intended for it to apply in a case like Petitioner's in which the offense conduct occurred prior to the FSA's passage. *Id.* at 448. Chief Judge Easterbrook conceded that there was "no satisfactory answer" as to why Congress would have decided that a 100:1 ratio is excessive, but then left in place the minimum and maximum sentences for persons whose crimes predate August 3, 2010, other than that "legislation is an exercise in compromise." *Id.* He did not identify any evidence that such a compromise over the effective date occurred.

Writing for the other five judges in dissent, Judge Williams argued that the purpose, the structure, and the text of the FSA indicate that it must apply to all post-enactment sentencings. In particular, she emphasized Congress's unusual grant of emergency authority to the Commission to promulgate amendments to the Guidelines "to achieve consistency" with "applicable law," meaning the new statutory minimums. *Id.* (Williams, J., dissenting from denial of rehearing en banc). In her view, it would make no sense for Congress to will that the amended Guidelines take effect immediately in sentencings, even for crimes committed before the Act, if those same defendants would be subject to pre-FSA mandatory minimum provisions. She relied on the rule that courts "are required to interpret statutes in a way that does not lead to nonsensical results." *Id.* at 456 (citing *United States v. Rutherford*, 442 U.S. 544, 552 (1979)).[4] More broadly, she questioned why Congress would have wanted sentencing judges to continue to impose sentences that it had already declared to be unfair. *Id.*

While joining Judge Williams's opinion in full, Judge Posner wrote a separate dissent emphasizing the "perverse" and "gratuitously silly" results that would follow if the FSA were construed to apply only to offenders whose conduct occurred after the FSA's passage. *Holcomb*, 657 F.3d at 462-63 (Posner, J., dissenting from denial of rehearing en banc). Judge Posner illustrated those results by presenting, in tabular form, examples of mandatory minimum sentences before and after the FSA's amendments and the contemporaneous "conforming" Guidelines ranges for different quantities of crack. In one example, an individual convicted of a pre-enactment crime involving 50 grams of crack would incur a mandatory minimum sentence of 120 months under the old law, even though his sentencing range under FSA-consistent Guidelines would be only 70 to 87 months. *Id.* at 462. As Judge Posner explained, unless the FSA's revised mandatory minimum sentences are also applicable to such defendants, they will receive sentences far in excess of the Guidelines that Congress intended would apply as soon as possible no matter when the offense conduct occurred. *Id.*

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[4] Judge Williams also cited the statement by Sen. Durbin, the FSA's co-sponsor, on the date it passed the Senate:

> Every day that passes without taking action to solve the problem is another day that people are being sentenced under a law that virtually everyone agrees is *unjust*. . . . If this bill is enacted into law, it will *immediately* ensure that every year, thousands of people are treated more fairly in our criminal justice system.

Holcomb, 657 F.3d at 454 (emphasis added).

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SUMMARY OF ARGUMENT

Congress passed the FSA to "restore fairness" to federal crack sentencing. It acted unanimously to repeal the widely criticized mandatory minimum sentencing structure that formerly applied to crack offenses and to replace it with penalties that more closely resembled those in effect for powder cocaine. The Seventh Circuit held that these efforts were intended to benefit only defendants who committed their offenses after the enactment. But the text, legislative history, and purpose of the FSA all compel the conclusion that once Congress completed its historic overhaul of crack sentencing policy, it wanted those amendments to apply immediately.

The text of the statute plainly supports this interpretation. The FSA contained an urgent directive to the Sentencing Commission to issue "as soon as practicable, and in any event, not later than 90 days" Guidelines that would "conform" to and be "consistent" with that law, including the new mandatory minimums. The clear implication of the statutory language was that the new mandatory minimums should take effect rapidly so that the Guidelines would have a model against which to "conform" and be consistent. The Commission fulfilled its obligation and issued amended Guidelines that took effect on November 1, 2010, which implemented those minimums. Congress thereafter did nothing to suggest that the Commission misunderstood its proper mandate.

The FSA's legislative history and purpose reinforce the conclusion that the statute was intended to apply immediately. That legislative history contains repeated references to the need to change the former mandatory minimum sentencing provisions immediately so as to avoid the continued imposition of unjust sentences. Legislators critiqued the old differential between penalties for powder cocaine and crack cocaine as unwarranted, potentially discriminatory, and even divorced from the proper goals of punishment. Those interests leave little room for an interpretation of the FSA that would force district courts to keep carrying out a discredited sentencing policy. Indeed, while earlier versions of crack sentencing reform bills expressly forbade retroactive application, the FSA did not. Legislative silence on this point speaks volumes about Congress's intentions.

Finally, the Saving Statute, 1 U.S.C. § 109, does not support a different result. As this Court has explained, no "magical passwords" are required to be spoken by Congress to avoid the application of that default rule. Here, the text, legislative history, and purpose of the FSA provide more than a "fair implication" that Congress intended the FSA to have immediate effect, which is sufficient to blunt any impact of § 109. But even if there were any doubt on that point, two other canons of construction favor the position that the FSA's new mandatory minimums took effect immediately. The rule of lenity requires any ambiguity as to the FSA's temporal scope to be resolved in favor of Petitioner. And the doctrine of Constitutional avoidance counsels in favor of an interpretation that lessens concerns about whether the statute violates equal protection.

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ARGUMENT

I. CONGRESS INTENDED THE FSA TO APPLY TO ALL INITIAL SENTENCING PROCEEDINGS OCCURRING AFTER ITS ENACTMENT.

The text, legislative history, and purpose of the FSA demonstrate that Congress intended its provisions to apply immediately to all sentencing proceedings occurring after its passage. Congress ordered the

Commission to act with great urgency to issue amended Guidelines that would "conform" to the provisions of the Act. App. 7. The unusual emphasis on speed of implementation, and the accompanying statutory directive that the Guidelines must "achieve consistency" with the FSA, strongly imply that Congress intended the FSA to take effect immediately. The urgency in applying the FSA also follows from the stated purpose of the Act, which was to "restore fairness to Federal cocaine sentencing," and is corroborated by a variety of statements by members of Congress who believed that the old law was unnecessarily harsh, even racially discriminatory, and should not be applied a day longer.

A. Immediate Application Of The FSA Is Consistent With Its Statutory Text.

This Court has explained that legislative intent to apply a statute to pending cases may be revealed by the express language of the statute. *Graham v. Goodcell*, 282 U.S. 409, 419-20 (1931). In this case, the text of the FSA demonstrates that its ameliorative provisions were designed to have immediate effect.

1. The FSA Applies At Least To Defendants Sentenced On Or After August 3, 2010.

The FSA ordered the Commission to make "conforming amendments" to the Guidelines in order to "achieve consistency" with other Guideline provisions and "applicable law." FSA § 8, 124 Stat. at 2374. App. 7. Here, "applicable law" plainly includes the FSA itself, including its revised mandatory minimums for crack offenders, because prior statutes would have already been addressed by the Commission and would not have required any new Guidelines to implement them. All three of these statutory phrases – "conforming amendments," "applicable law," and "achieve consistency" – compel the conclusion that Congress intended the new mandatory minimums to be effective immediately, especially when viewed in the light of two other significant features of the FSA and the Guidelines.

First, the FSA required the Commission to act with extraordinary speed. In its normal amendment cycle, the Commission promulgates amendments to the Guidelines and submits them for review to Congress with a formal statement of the reasons for the changes. 28 U.S.C. § 994(p). The amendments take effect on a date specified by the Commission, but no earlier than 180 days after their submission, and are subject to Congressional disapproval. *Id.* Here, by contrast, Congress suspended the normal rulemaking process by forgoing its power of disapproval altogether. It also greatly shortened their time for promulgation.[5] Congress's explicit direction to the

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To our knowledge, Congress has directed the Commission to implement new Guidelines within 90 days under its emergency authority only three other times in over two decades. *See*

(Continued on following page)

Commission to issue "conforming" amendments "as soon as practicable, and in any event not later than 90 days," FSA § 8, 124 Stat. at 2374, made plain its desire for the new Guidelines to take effect as quickly as possible.

Second, the statutory rule is that all Guidelines amendments apply immediately. That is, a defendant is sentenced under the Guidelines in effect on the day of sentencing, regardless of when his offense took place. *See* 18 U.S.C. § 3553(a)(4)(ii); U.S.S.G. § 1B1.11. When it passed the Sentencing Reform Act that originally authorized the creation of the Guidelines, Congress emphasized the importance of this principle to promote consistency in punishment. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983) ("To impose a sentence under outmoded Guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.").[illegible]

Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. No. 110-179, § 5(c); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6703(b); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 314(c)(2). In each of those cases, Congress required the Commission to promulgate Guidelines that would either create or *increase* penalties. We are not aware that Congress has ever previously required the Commission to act with such extraordinary speed in order to *decrease* penalties.

[illegible] Likewise, this Court has consistently held that factual and legal developments subsequent to defendant's offense conduct should be considered by the court at the time of sentencing to ensure that sentencing determinations are just and effective. *See, e.g., Pepper v. United States*, 131 S. Ct. 1229, 1242 (2011)

(Continued on following page)

Even after the Guidelines have become advisory, the rule remains the same. The amended Guidelines implementing the FSA – which lowered the crack offense levels according to an 18:1 ratio – therefore applied to defendants who were sentenced from that day forward.

Against the backdrop of these rules, when Congress required the Commission to implement conforming Guidelines "as soon as practicable" in order to achieve consistency with the new mandatory minimums, it knew that those Guidelines could be issued and take effect on virtually any day. Congress must have intended, therefore, that the new mandatory minimums would already be in effect – else the requirement that the Guidelines must "conform" to those statutory provisions would be empty and pointless. Worse, in that scenario, far from "achiev[ing]

("a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing") (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)); *United States v. Dunnigan*, 507 U.S. 87, 96-98 (1993) (upholding increased sentences for conviction offense based on defendant's subsequent untruthful trial testimony); *Wasman v. United States*, 468 U.S. 559, 569 (1984) (explaining that it "would have been inappropriate" for a judge at a resentencing to fail to consider a new distinct criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial). *Cf.* 18 U.S.C. § 3661 (codifying long-standing principle that there should be no limitations on the information concerning an offender or his offense that a district court may receive and consider for the purpose of imposing an appropriate sentence).

consistency" with the FSA, the amended Guidelines would actually promote *inconsistency*, as they would be based on an 18:1 ratio even as the former mandatory minimums that prescribed a 100:1 ratio would still apply. The urgency of Congress's directive strongly implies that it expected the new mandatory minimums would already govern.

Indeed, the realities of the criminal process undercut any contrary interpretation. All defendants sentenced on August 4, 2010 – and for many months thereafter – committed their offenses before August 3, when the higher mandatory minimums were in effect.[7] As Judge Posner observed, the urgency of Congress's direction to the Commission to act as soon as practicable makes no sense if none of those defendants would enjoy the benefits of the reduced Guidelines. *Holcomb*, 657 F.3d at 462-63 (Posner, J., dissenting from denial of rehearing en banc). Courts are "disinclined to say that what Congress imposed with one hand . . . it withdrew with the other." *Abbott v. United States*, 131 S. Ct. 18, 27 (2010) (internal quotation marks omitted). And interpretations of statutes that produce absurd results should be avoided. *See Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) (recognizing that "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion" (internal quotation marks omitted)). As this Court recently confirmed, courts must avoid reading a mandatory minimum provision in a way that "undercut[s] that same bill's primary objective," benefits the "worst offenders," and "result[s] in sentencing anomalies Congress surely did not intend." *Abbott*, 131 S. Ct. at 27.

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[7] Lengthy delays often occur between the commission of an offense and sentencing. Initially, the five-year statute of limitations for drug offenses allows for delays between the offense and the filing of charges. 18 U.S.C. § 3282(a). The median time between the indictment and the sentencing for most federal drug offenses other than marijuana is over 11 months. Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 272, tbl. D-10 (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx (last visited Jan. 24, 2012). If a defendant exercises his right to a trial, the median time between the indictment and the sentencing increases to almost 17 months. *Id.* Indeed, in Petitioner's own case, the total delay between his offense and sentencing spanned almost four years. Assuming the same pace of proceedings, a defendant who committed his offense immediately upon the FSA's enactment would not be sentenced until sometime in 2014.

If there were any doubt that the amended Guidelines properly implemented Congress's directive to "achieve consistency" with the FSA, Congress's acquiescence in the Commission's approach during the next year resolves it. The temporary amended Guidelines were promulgated on October 15, 2010, became effective on November 1, 2010, and remained in effect for 12 months. U.S.S.G. App. C, Amend. 748. In the interim, the Commission began the process of promulgating the permanent amended Guidelines, which it submitted to Congress on April 28, 2011, according to the usual process. The permanent Guidelines went into effect November 1, 2011, without Congressional disapproval. U.S.S.G. App. C. Amend. 750. This demonstrates that the Commission's reading of the FSA as providing the "applicable law" was exactly what Congress had intended. *See Kimbrough*, 552 U.S. at 106 (observing that Congress gave "tacit acceptance" to the Commission's work when it "failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority under 28 U.S.C. § 994(p)").

There are other textual indications that Congress did not want to delay the application of the mandatory minimum provisions of the FSA. Congress directed the Commission to promulgate sentencing enhancements for drug trafficking offenders where certain aggravating factors are present, such as the use of violence or the sale of drugs to minors. FSA § 6, 124 Stat. at 2373. App. 4-6. Likewise, it mandated sentencing reductions for offenders where certain mitigating factors exist, such as when a family relationship supplies the motive to sell drugs for no compensation. FSA § 7, 124 Stat. at 2374. App. 6-7. The Commission complied within the 90-day window. U.S.S.G. App. C, Amend. 748. Like the other Guideline amendments, these went into effect immediately and applied to all sentencings from that day forward.

Congress's objective of tailoring the drug trafficking Guidelines to reflect more accurately a defendant's actual culpability undercuts the view that Congress intended the old mandatory minimums to remain in effect for defendants not yet sentenced as of August 3, 2010. Congress desired to impose less severe penalties on the least serious crack offenders and more severe penalties on the most serious offenders. *See* 156 Cong. Rec. S10491-92 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) (noting that the crack amendments intend to "return the focus of Federal cocaine sentencing policy to drug kingpins, rather than street level dealers"). The persistence of the old mandatory minimums disrupts this goal. Mandatory minimums undermine, rather than advance, the goal of individualized punishment, because they interfere with the ability of the sentencing judge "to consider every convicted person as an individual and every case as . . . unique." *Koon v. United States*, 518 U.S. 81, 113 (1996); *see Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring) (noting that mandatory minimums "rarely reflect an effort to achieve sentencing proportionality – a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently"). It makes far more sense to assume that all of the initiatives contained in the FSA point in the same direction – namely, to promote sentences for crack defendants that appropriately reflect the seriousness of their crimes through the consideration of relevant factors other than the weight of crack involved alone.

Finally, immediate application of the FSA may be inferred from its directive to the Commission to prepare a report to Congress regarding the impact of the FSA five years hence. FSA § 10, 124 Stat. at 2375, App. 9. If the pre-FSA mandatory minimum sentences continued to apply to the large class of defendants whose offense conduct preceded the effective date of the Act, then during much of the time period in which the Commission would be studying the effects of the FSA, the Act's changes to the Guidelines would be inapplicable to many low-level offenders whose revised Guidelines ranges would be trumped by the old mandatory minimum terms. That result would undermine Congress's goal to compile useful data about the FSA's impact on federal sentencing. Moreover, it would require the Commission to assume the heavy administrative burden of tracking which of the many thousands of defendants sentenced after the FSA committed their offenses before its enactment. It is highly unlikely that Congress had such a plan in mind.

2. The FSA Undoubtedly Applies To Defendants Sentenced On Or After November 1, 2010.

Even if this Court concludes that Congress did not intend the FSA's amendments to mandatory minimum sentences to have immediate effect upon enactment, at a minimum these amendments must apply to defendants like Petitioner who were sentenced on or after November 1, 2010. Whatever Congress's expectation of how long it would take the Commission to issue its "conforming" Guidelines, it directed (and therefore knew) that it would occur no later than November 1. Hence, for the reasons given above, Congress must have intended that defendants sentenced on or after November 1, 2010 would enjoy the benefits of the recalibrated crack Guidelines – meaning that the new, lower mandatory minimums would have to take effect by then.

B. Immediate Application Of The FSA Is Consistent With Its Legislative History And Purpose.

The FSA's legislative history and purpose further support the conclusion that Congress desired for the FSA to have immediate impact.

Members of Congress spoke directly to the need for an immediate and ameliorative change in federal crack-cocaine sentencing. In urging his colleagues to support the FSA, Senator Dick Durbin stated that Congress had discussed the need to address the crack-powder disparity for far too long, and that "[e]very day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." 156 Cong. Rec. S1680-81 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin). He continued: "If this bill is enacted into law, it will *immediately* ensure that every year, thousands of people are treated more fairly in our criminal justice system."

Id. at S1681 (emphasis added). Corroborating the need for the FSA's urgent application, Senator Arlen Specter noted that the Deputy Attorney General and two district judges had "testified in favor of an *immediate* reduction or elimination of [the sentencing] disparity." 155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter). Statements by other members of Congress were to the same effect. *See, e.g.*, 156 Cong. Rec. S1683 (Mar. 17, 2010) (statement of Sen. Leahy) ("Attorney General Holder also reminded us that the stakes are simply too high to let reform in this area wait any longer" (internal quotation marks omitted)). To our knowledge, no member of Congress expressed any other view about the temporal applicability of the FSA.

Numerous bills that were precursors to the FSA contained provisions expressly precluding their retroactive application. *See* H.R. 265 § 11, 111th Cong. (2009); H.R. 4545 § 11, 110th Cong. (2007); S. 1383 § 204(b), 110th Cong. (2007); S. 1711 § 11, 110th Cong. (2007). Each of those prior versions stated: "There shall be no retroactive application of any portion of this act." *Id.* Tellingly, the FSA does not include any such limitation. Congress's omission of this limiting language in the FSA is further evidence that it intended the statute to apply immediately upon its enactment. *See United States v. Yermian*, 468 U.S. 63, 72 (1984) (changes from the prior version of a bill vetoed by the President provided "convincing evidence" of the statute's meaning); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress included limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

The various expressions of Congressional purpose in passing the FSA also support the conclusion that Congress wanted the FSA to apply immediately. One of Congress's primary considerations was to end the perception that the 100:1 ratio inherent in the old law was racially discriminatory. In a rare showing of bi-partisan unity, Republicans and Democrats alike expressed concern that the old law treated similarly situated offenders differently, with black crack offenders receiving significantly harsher sentences than white offenders trafficking in cocaine powder. Senator Patrick Leahy, one of the lead sponsors of the FSA, stated that the 100:1 ratio "is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources. These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under the law." 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010). Other members of Congress expressed similar concerns. *See, e.g.*, 156 Cong. Rec. H6203 (daily ed. July 28, 2010) (statement of Rep. Hoyer) ("The 100-to-1 disparity is counterproductive and unjust."); 155 Cong. Rec. S10492 (daily ed. Oct. 15. 2009) (statement of Sen. Sessions) ("I definitely believe that the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today"). Some legislators stated that the old mandatory minimums simply served no legitimate penal interests. 156 Cong. Rec. H6197 (daily ed. July 28, 2010); 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009).

Members of Congress also commented that the imposition of sentences under the 100:1 ratio undermined confidence in the criminal justice system and weakened law enforcement efforts. *See, e.g.*, 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) ("[w]hen one looks at the racial implications of the crack-powder disparity, it has bred disrespect for our criminal justice system. It has made the job of those of us in law enforcement more difficult. . . . [I]t is time to do away with that disparity") (statement of Sen. Durbin, citing testimony of Attorney General Eric Holder before the Senate Judiciary Committee).[*]

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[*] *See also* 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy) (stating that the 100:1 ratio "has had a significantly disparate impact on racial and ethnic minorities. . . . It is no wonder this policy has sparked a nationwide debate about racial bias and undermined citizens' confidence in the justice system"); 155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter) ("These sentencing disparities undermine the confidence in the criminal justice system. Our courts and our laws must be fundamentally fair; just as importantly, they must be perceived as fair by the public. I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does."); 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) ("[u]nder the current disparity, the credibility of our entire drug enforcement system is weakened") (statement of Sen. Durbin, quoting testimony of Asa Hutchinson, former head of the DEA under President George W. Bush).

Even worse, the old law failed to satisfy its primary goal, which was to target major drug traffickers. *See* 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy) (explaining that the primary purpose of the 1986 Act "was to punish the major traffickers and drug kingpins who were bringing crack into our neighborhoods," but in practice, "more than half of Federal crack cocaine offenders [we]re low-level street dealers and users, not the major traffickers Congress intended to target").

Given the nature of these legislative purposes, it defies reason to suppose that Congress intended that courts would continue to apply the old mandatory minimums or that it would want such application to depend on the date of each defendant's offense. In interpreting the FSA, this Court should "imput[e] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). Congress's interests in "restor[ing] fairness" and avoiding the appearance of racially disparate results suggest strongly that it wanted the FSA's immediate application, especially when such application carried no collateral costs in the case of defendants who had not yet been sentenced.

Contrary to the suggestion by Chief Judge Easterbrook, even if the FSA was the result of some "legislative compromise," *Holcomb*, 657 F.3d at 450-51, there is no evidence that it was a compromise as to its temporal scope. Nothing in the legislative history of the Act even hints that members of Congress bargained over whether an old law fraught with problems should continue to apply at sentencing.[7] To the contrary, the legislative record is replete with statements that the old law no longer served a valid purpose and should be replaced as soon as possible. Where the evident reason for repeal of a law is the belief that it is unfair – indeed, perhaps even discriminatory – there is a strong inference that Congress wanted the repeal to take effect immediately. *Cf. Hamm*, 379 U.S. at 315 (holding that the Civil Rights Act of 1964 immediately abated a prior penalty for sit-in demonstrations targeting black protestors, including those held long before the Act's passage, because it was intended to "obliterate the effect of a distressing chapter of our history").

II. THE SAVING STATUTE DOES NOT CONTROL BECAUSE CONGRESS FAIRLY IMPLIED THAT THE FSA APPLIES IMMEDIATELY.

The Saving Statute, 1 U.S.C. § 109, does nothing to disturb the conclusion that the FSA was meant to operate immediately. As this Court has emphasized many times, § 109 is merely a default rule intended to save a prior penalty when Congress has not signaled to the contrary. Here, the Act's statutory text, legislative history, and purpose demonstrate that Congress has at least "fairly implied" that immediate application is required. Nothing more is needed to overcome § 109's default rule, even assuming that statute is interpreted to be applicable in this context. *See* Br. of Petitioner Dorsey, No. 11-5683 (arguing additional reasons why § 109 might not apply in the first place).

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[7] Chief Judge Easterbrook asserted that members of Congress who supported a higher ratio favored no retroactivity, but he provided no basis for that claim.

This Court has held that a later statute need not use specific language to exempt itself from § 109's reach. Section 109 is no more than a rule of statutory construction, which is "to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress." *Hertz v. Woodman*, 218 U.S. 205, 217 (1910). It reflects an early rule that originally served the limited purpose of preventing the complete abatement of a criminal prosecution, and was enacted in derogation of the common-law presumption favoring the application of current law. *United States v. Tynen*, 78 U.S. 88 (1870). Simply put, § 109 controls only if and when Congress does not indicate otherwise.

Thus, in *Great N. Railway Co. v. United States*, the Court clarified that § 109 has no force if by "necessary implication" applying it would "set the legislative mind at naught." 208 U.S. 452, 465 (1908); *see United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3 (1926). Invoking similar language, the Court in other cases has stated that a later statute may supplant § 109 by "plain," "clear," *Hertz*, 218 U.S. at 217, or "fair." *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 569-60 n.10 (1974), implication.[10] Whatever the precise formulation, when the import of a later statute directly contradicts § 109 by implication, no express statement is required to give effect to that statute.

The reason Congress need not use specific language to avoid the effect of § 109 is that one legislature is competent to repeal any law that a former one was competent to pass. As Chief Justice Marshall explained more than two centuries ago, Congress's legislative power under Article I of the Constitution is circumscribed by the principle that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). Among the powers of a legislature that a prior legislature cannot abridge is the power to alter legislative acts by contradicting them in any way it deems appropriate. *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring).

In a similar context, this Court has outlined the framework for finding a fair implication when a statute contains its own saving clause. In *Marcello v. Bonds*, 349 U.S. 302 (1955), this Court interpreted the Immigration and Nationality Act to exempt deportation hearings from the procedures of the Administrative Procedure Act ("APA"), despite a saving clause in the APA stating that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." *Id.* at 310. The Court concluded that the Immigration and Nationality Act superseded the APA's requirements because to hold otherwise would render Congress's painstaking efforts to adapt the APA to the particular needs of the deportation process meaningless. 349 U.S. at 309-10. In giving effect to the clear intent of Congress, as evidenced by the new law's text and its legislative history, the Court refused to require Congress to use "magical passwords" to create an exemption from the APA. *Id.* at 310.

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[10] In Judge Posner's view, by changing the standard from "necessary" implication to a "fair" implication in more recent cases, this Court has "reduced the force" of § 109. *Holcomb*, 657 F.3d at 461 (Posner, J., dissenting from denial of rehearing en banc).

As the Court observed, it was apparent from the statutory language of the new law that Congress intended to establish a specialized administrative procedure applicable to deportation hearings specifically. The framework of the Immigration and Nationality Act drew liberally from analogous provisions of the APA but made clear that the APA was being used only as a general guide. *Id.* at 308. Not only did the same legislators sponsor the Immigration and Nationality Act and the APA, the legislative history of the new law indicated that the new procedures were meant to be exclusive. *Id.* at 308-10. This Court explained that in light of Congress's laborious adaptation of the APA to the deportation process, the recognition in the legislative history of this adaptive technique and of the particular deviations, and the direction in the new law that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings, Congress intended to exempt deportation proceedings from the default APA rule. *Id.* at 310.

Applying the same analysis to the FSA, the indications of Congressional intent in passing the Act discussed above are more than sufficient to supply a fair implication that the FSA applies immediately upon its enactment. The urgency of Congress's directive to the Commission to issue "conforming" Guidelines with "applicable law" indicates that Congress intended the FSA's new mandatory minimum thresholds to apply to all new sentencings right away – and certainly to those occurring after November 1, 2010, the effective date of the amended Guidelines. Congress's mandate to the Commission to issue a report within five years of the FSA's enactment, if it was to be meaningful, suggests that the report would cover sentences following the FSA's passage that would encompass pre-enactment conduct. Moreover, Congress's goal to ameliorate unjust and racially discriminatory sentencing disparities provides further support for its immediate application.[21]

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[21] The rule laid down by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), is consistent with the FSA's immediate application. In *Landgraf*, the Court held that a petitioner could not benefit from more favorable damages provisions in the Civil Rights Act of 1991 that became effective while her

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Even if § 109 did apply here, its force would be outweighed by the effects of two other rules of statutory construction: the rule of lenity, and the canon of Constitutional avoidance.

First, the rule of lenity provides guidance in reading a fair implication from the FSA in favor of its immediate application. The rule of lenity is a canon of statutory construction that requires courts to interpret statutes in a manner that avoids imposing harsher punishments absent clear Congressional intent. *Ladner v. United States*, 358 U.S. 169, 178 (1958). This Court has held that when faced with an ambiguous text or legislative history, the ambiguity must be resolved in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 41-54 (1994). The doctrine ensures that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner*, 358 U.S. at 178; *see United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (noting that the doctrine is rooted in "the instinctive distaste against men languishing in prison unless the

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case was on appeal. The FSA, by contrast, is not a statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Nor would its application raise any Constitutional concerns, as a higher penalty in a criminal case otherwise might.

lawmaker has clearly said they should" (quoting H. Friendly, Benchmarks 196, 209 (1967)).

In interpreting the application of a mandatory minimum sentencing provision in *Simpson v. United States*, 435 U.S. 6 (1978), this Court explained that the rule of lenity has special force in light of a justifiable "reluctance to increase or multiply punishments absent a clear and definite legislative directive." 435 U.S. at 15. As Justice Breyer similarly observed in *Dean v. United States*, 129 S. Ct. 1849 (2009), the rule of lenity tips the balance in favor of the defendant in this context because an interpretation that errs on the side of leniency does not require the automatic reduction of a sentence, but rather affords a sentencing judge the opportunity to impose a sentence that best serves the goals of punishment. *Id.* at 1860-61 (Breyer, J., dissenting). Application of the FSA here and in similar cases would not necessarily require district judges to impose sentences that are lower or unduly lenient; rather, it would afford them the opportunity to give full effect to the amended Guidelines without the former unfair and rigid statutory mandates. It would also allow them in more cases to consider all of the circumstances surrounding the offense and the offender to impose a sentence that is "sufficient, but not greater than necessary," to achieve the goals of sentencing identified by Congress. 18 U.S.C. § 3553(a)(2).

When Congress does not speak expressly to the temporal scope of a new criminal statute and courts struggle to sort out competing inferences as to its application, the rule of lenity supplies the tie-breaking vote for the defendant. Accordingly, even assuming that an ambiguity persists regarding when the FSA is meant to take effect, that ambiguity should be resolved in favor of immediate application.

Second, the doctrine of Constitutional avoidance provides additional support for the FSA's immediate application. Sentencing defendants on the basis of pre-FSA mandatory sentencing terms should be avoided because it raises serious Constitutional arguments implicating the guarantee of equal protection. As this Court has explained, when a statute is susceptible to two constructions, one of which raises doubtful Constitutional questions, and the other of which avoids such questions, the court's duty is to adopt the latter. *Jones v. United States*, 526 U.S. 227, 239 (1999). This canon of statutory construction, which is a tool for choosing between competing plausible interpretations of a statutory text, "is thus a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

As discussed above, members of Congress expressly noted that the old 100:1 ratio was "contrary to our fundamental principles of equal protection under the law." *See, e.g.*, 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn). Some of these members stated that the old mandatory minimums no longer served any legitimate penal interests, and that they were "not able to defend the sentences that are required to be imposed under the law today." 155 Cong. Rec. S10492 (Oct. 15, 2009) (statement of Sen. Sessions). Application of the FSA to cases not yet final is required to avoid a conflict with the Equal Protection Clause and, as explained above, give effect to Congress's intent to remedy the injustices resulting from the old law.

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CONCLUSION

For the foregoing reasons, the judgment below should be vacated and the case remanded for resentencing in accordance with the FSA.

January 25, 2012

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FAIR SENTENCING ACT OF 2010

S. 1789

One Hundred Eleventh Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington
on Tuesday, the fifth day of January,
two thousand and ten

An act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Sentencing Act of 2010".

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA. – Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended –

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

(b) IMPORT AND EXPORT ACT. – Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended –

(1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE. – Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended –

(1) in subparagraph (A), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in subparagraph (B), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION. – Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended –

(1) in paragraph (1), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in paragraph (2), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if –

(1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;

(2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or

(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant –

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction

(ii) The defendant –

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that –

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant –

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall –

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) IN GENERAL – Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797-u et seq.).

(b) CONTENTS. – The report submitted under subsection (a) shall –

> (1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;
>
> (2) address the effect of drug courts on recidivism and substance abuse rates;
>
> (3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;
>
> (4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and
>
> (5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

RELEVANT PORTIONS OF 21 U.S.C. § 841 BEFORE ENACTMENT OF THE FSA

PART D OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

> (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
>
> (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –
>
> > (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts. isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any

person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION. –

(A) IN GENERAL. – Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION. – For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

* * *

RELEVANT PORTIONS OF 21 U.S.C. § 841 AFTER ENACTMENT OF THE FSA

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers

> or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50.000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any

person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) Penalties for distribution. –

(A) In general. – Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) Definition. – For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

* * *

RELEVANT PORTIONS OF SENTENCING GUIDELINES BEFORE ENACTMENT OF THE FSA

November 1, 2009

PART D – OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C.

§ 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible

vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B 1.2 (Mitigating Role), increase by **2** levels.

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(6) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.

(10) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If –

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or

maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity*	**Base Offense Level**
(1)	• 30 KG or more of Heroin; • 150 KG or more of Cocaine;	**Level 38**

- 4.5 KG or more of Cocaine Base;
- 30 KG or more of PCP, or 3 KG or more of PCP (actual);
- 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of “Ice”;
- 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);
- 300 G or more of LSD;
- 12 KG or more of Fentanyl;
- 3 KG or more of a Fentanyl Analogue;
- 30,000 KG or more of Marihuana;
- 6,000 KG or more of Hashish;
- 600 KG or more of Hashish Oil;
- 30,000,000 units or more of Ketamine;
- 30,000,000 units or more of Schedule I or II Depressants;
- 1,875,000 units or more of Flunitrazepam.

(2)
- At least 10 KG but less than 30 KG of Heroin; **Level 36**
- At least 50 KG but less than 150 KG of Cocaine;
- At least 1.5 KG but less than 4.5 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of “Ice”;
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);

- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3)
- At least 3 KG but less than 10 KG of Heroin; **Level 34**
- At least 15 KG but less than 50 KG of Cocaine;
- At least 500 G but less than 1.5 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;

- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4)
- At least 1 KG but less than 3 KG of Heroin; **Level 32**
- At least 5 KG but less than 15 KG of Cocaine;
- At least 150 G but less than 500 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;

- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5)
- At least 700 G but less than 1 KG of Heroin; **Level 30**
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 50 G but less than 150 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;

- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- 700,000 or more units of Schedule III Hydrocodone;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6)

- At least 400 G but less than 700 G of Heroin; **Level 28**
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 35 G but less than 50 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;

- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7)

- At least 100 G but less than 400 G of Heroin; **Level 26**
- At least 500 G but less than 2 KG of Cocaine;
- At least 20 G but less than 35 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;

- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
- At least 6.250 but less than 25,000 units of Flunitrazepam.

(8)
- At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
- At least 5 G but less than 20 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;

- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

(9)
- At least 60 G but less than 80 G of Heroin; **Level 22**
- At least 300 G but less than 400 G of Cocaine;
- At least 4 G but less than 5 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;

- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10)
- At least 40 G but less than 60 G of Heroin; **Level 20**
- At least 200 G but less than 300 G of Cocaine;
- At least 3 G but less than 4 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;

- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11)
- At least 20 G but less than 40 G of Heroin; **Level 18**
- At least 100 G but less than 200 G of Cocaine;
- At least 2 G but less than 3 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;

- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12)
- At least 10 G but less than 20 G of Heroin; **Level 16**
- At least 50 G but less than 100 G of Cocaine;
- At least 1 G but less than 2 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
- At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl;

- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

(13)
- At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
- At least 500 MG but less than 1 G of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;

- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam.

(14)
- Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
- Less than 500 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;

- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15)
- At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Ketamine;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16)	• At least 250 G but less than 1 KG of Marihuana; • At least 50 G but less than 200 G of Hashish; • At least 5 G but less than 20 G of Hashish Oil; • At least 250 but less than 1,000 units of Ketamine; • At least 250 but less than 1,000 units of Schedule I or II Depressants; • At least 250 but less than 1,000 units of Schedule III Hydrocodone; • At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone); • Less than 62 units of Flunitrazepam; • At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam); • 40,000 or more units of Schedule V substances.	**Level 8**
(17)	• Less than 250 G of Marihuana; • Less than 50 G of Hashish; • Less than 5 G of Hashish Oil; • Less than 250 units of Ketamine; • Less than 250 units of Schedule I or II Depressants; • Less than 250 units of Schedule III Hydrocodone; • Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone); • Less than 4,000 units of Schedule IV substances (except Flunitrazepam); • Less than 40,000 units of Schedule V substances.	**Level 6**

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".

(G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

RELEVANT PORTIONS OF SENTENCING GUIDELINES AFTER ENACTMENT OF THE FSA

November 1, 2011

PART D – OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C.

§ 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

(2) If the defendant used violence, made a credible threat to use violence, or

directed the use of violence, increase by **2** levels.

(3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

(6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(7) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

(13) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If –

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, increase by **2** levels.

(15) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise, decrease by **2** levels.

(16) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X 1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or

attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

	Controlled Substances and Quantity*	Base Offense Level
(1)	• 30 KG or more of Heroin; • 150 KG or more of Cocaine; • 8.4 KG or more of Cocaine Base; • 30 KG or more of PCP, or 3 KG or more of PCP (actual); • 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; • 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); • 300 G or more of LSD; • 12 KG or more of Fentanyl; • 3 KG or more of a Fentanyl Analogue; • 30,000 KG or more of Marihuana; • 6,000 KG or more of Hashish; • 600 KG or more of Hashish Oil; • 30,000,000 units or more of Ketamine; • 30,000,000 units or more of Schedule I or II Depressants; • 1,875,000 units or more of Flunitrazepam.	**Level 38**
(2)	• At least 10 KG but less than 30 KG of Heroin;	**Level 36**

- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3)	- At least 3 KG but less than 10 KG of Heroin; - At least 15 KG but less than 50 KG of Cocaine; - At least 840 G but less than 2.8 KG of Cocaine Base; - At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); - At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"; - At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual); - At least 30 G but less than 100 G of LSD; - At least 1.2 KG but less than 4 KG of Fentanyl; - At least 300 G but less than 1 KG of a Fentanyl Analogue; - At least 3,000 KG but less than 10,000 KG of Marihuana; - At least 600 KG but less than 2,000 KG of Hashish; - At least 60 KG but less than 200 KG of Hashish Oil; - At least 3,000,000 but less than 10,000,000 units of Ketamine; - At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;	**Level 34**

- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4)
- At least 1 KG but less than 3 KG of Heroin; **Level 32**
- At least 5 KG but less than 15 KG of Cocaine;
- At least 280 G but less than 840 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;
- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;

- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5)
- At least 700 G but less than 1 KG of Heroin; **Level 30**
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 196 G but less than 280 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;
- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;

- 700,000 or more units of Schedule III Hydrocodone;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6)
- At least 400 G but less than 700 G of Heroin; **Level 28**
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 112 G but less than 196 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;
- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;

- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7)
- At least 100 G but less than 400 G of Heroin; **Level 26**
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;

- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8)
- At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;

- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

(9)
- At least 60 G but less than 80 G of Heroin; **Level 22**
- At least 300 G but less than 400 G of Cocaine;
- At least 16.8 G but less than 22.4 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;
- At least 60 KG but less than 80 KG of Marihuana;

- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10)
- At least 40 G but less than 60 G of Heroin; **Level 20**
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;

- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11)
- At least 20 G but less than 40 G of Heroin; **Level 18**
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);

- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;
- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12)
- At least 10 G but less than 20 G of Heroin; **Level 16**
- At least 50 G but less than 100 G of Cocaine;
- At least 2.8 G but less than 5.6 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine

(actual), or at least 500 MG but less than 1 G of "Ice";

- At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl;
- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

(13)
- At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
- At least 1.4 G but less than 2.8 G of Cocaine Base;

- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam.

(14)
- Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
- Less than 1.4 G of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15)
- At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Ketamine;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16)
- At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;
- At least 250 but less than 1,000 units of Ketamine;
- At least 250 but less than 1,000 units of Schedule I or II Depressants;
- At least 250 but less than 1,000 units of Schedule III Hydrocodone;
- At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);

- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

(17)
- Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 units of Ketamine;
- Less than 250 units of Schedule I or II Depressants;
- Less than 250 units of Schedule III Hydrocodone;
- Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

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*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".

(G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

SAVING STATUTE, 1 U.S.C. § 109

§ 109. Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

LETTER FROM SENATORS DURBIN AND LEAHY TO ATTORNEY GENERAL, NOVEMBER 17, 2010

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 17, 2010

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

Thank you for your leadership in urging Congress to pass the Fair Sentencing Act of 2010 (P.L. 111-220). As the lead sponsors of the Fair Sentencing Act, we write to urge you to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment.

The preamble of the Fair Sentencing Act states that its purpose is to "restore fairness to Federal cocaine sentencing." While the Fair Sentencing Act did not completely eliminate the sentencing disparity between crack and powder cocaine, as the Justice Department had advocated, it did significantly reduce the disparity. We believe this will decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities.

Our goal in passing the Fair Sentencing Act was to restore fairness to Federal cocaine sentencing as soon as possible. As Senator Durbin said when the Fair Sentencing Act passed the Senate: "We have talked about the need to address the crack-powder disparity for too long. Every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." You expressed a similar sentiment in testimony before the Senate Judiciary Committee, when you urged Congress to eliminate the crack-powder disparity: "The stakes are simply too high to let reform in this area wait any longer."

This sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment to the Sentencing Guidelines. The revised Guidelines took effect on November 1, 2010, and will apply to all defendants who have not yet been sentenced.

And this sense of urgency is why the Fair Sentencing Act's reduced crack penalties should apply to defendants whose conduct predates enactment of the legislation but who have not yet been sentenced. Otherwise, defendants will continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act. This absurd result is obviously inconsistent with the purpose of the Fair Sentencing Act.

As you know, Judge D. Brock Hornby, an appointee of President George H.W. Bush, recently held that the Fair Sentencing Act's reduced mandatory minimums apply to defendants who have not yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? . . . I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." We wholeheartedly agree with Judge Hornby.

We were therefore disturbed to learn that the Justice Department apparently has taken the position that the Fair Sentencing Act should not apply to defendants who have not yet been sentenced if their conduct took place prior to the legislation's enactment. In his opinion, Judge Hornby states that the Assistant U.S. Attorney in the case said he understood this to be the position of the Department of Justice.

Regardless of the legal merits of this position, the Justice Department has the authority and responsibility to seek sentences consistent with the Fair Sentencing Act as a matter of prosecutorial discretion. This is consistent with your view that reforming the sentencing disparity "cannot wait any longer." It is also consistent with the Justice Department's mission statement, which states that the Department should "seek just punishment for those guilty of unlawful behavior" and "ensure fair and impartial administration of justice for all Americans." As you said in your May 19, 2010 Memorandum to All Federal Prosecutors on Department Policy on Charging and Sentencing, "The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and evenhanded administration of the federal criminal laws." Indeed, it is the Justice Department's obligation not simply to prosecute defendants to the full extent of the law, but to seek justice. In this instance, justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.

Therefore, we urge you to issue guidance to federal prosecutors instructing them to seek sentences consistent with the Fair Sentencing Act's reduced mandatory minimums for defendants who have not yet been sentenced, regardless of when their conduct took place. Additionally, please provide us with any guidance that you have already issued to federal prosecutors regarding implementation of the Fair Sentencing Act.

Thank you for considering our views. We look forward to your prompt response.

Sincerely,

/s/ Dick Durbin
Dick Durbin

/s/ Patrick Leahy
Patrick J. Leahy

ATTORNEY GENERAL'S MEMORANDUM, JULY 15, 2011

[SEAL] **Office of the Attorney General**
Washington, D. C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr. [/s/ Eric H. Holder Jr.]
Attorney General

SUBJECT: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus, Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States* v. *Douglas,* 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed, United Slates* v. *Douglas,* No.10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions – and the serious impact on the criminal justice system of continuing to impose unfair penalties – I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to "restore Fairness in federal cocaine sentencing policy" but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the

Act's central goals of promoting public safety and public trust – and ensuring a fair and effective criminal justice system – justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the Federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme – defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate, to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law. That is what I direct you to undertake today.

RESPONDENT'S BRIEF

Nos. 11-5683 and 11-5721

In the Supreme Court of the United States

EDWARD DORSEY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in all initial sentencing proceedings after the effective date of the Act.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 2
Statutory provisions involved 2
Statement 2
I. Statutory background 3
  A. Adoption of the 100-to-1 ratio 3
  B. The Sentencing Commission's escalating criticism of the 100-to-1 ratio 5
  C. The Fair Sentencing Act 12
  D. The emergency Guidelines amendments 13
II. The present controversies 14
  A. *Dorsey* (No. 11-5683) 14
  B. *Hill* (No. 11-5721) 16
  C. Subsequent proceedings 18
Summary of argument 21

Argument:

The Fair Sentencing Act applies in all initial sentencing proceedings after its enactment 25
  A. The text, structure, and background of the FSA demonstrate Congress's intent to give the Act's reforms immediate effect 27
    1. Congress directed the Sentencing Commission to conform the Guidelines to "applicable law," which meant the FSA's new penalty scheme 27
    2. The history of the crack/powder sentencing disparity supports the inference that Congress intended the FSA's statutory amendments to be immediately effective 31

Table of Contents—Continued: Page

3. Congress understood that the Commission could not effectively "achieve[] consistency" with "applicable law" if the pre-FSA mandatory minimums remained in effect 36

B. The history and purposes of the FSA confirm that Congress did not intend district courts to continue to impose mandatory minimum sentences under a 100-to-1 ratio 43

1. The history of the FSA corroborates Congress's intent 43

2. The purpose of the FSA reinforces Congress's intent 47

C. The court of appeals' reliance on the general saving statute was misplaced 50

1. Section 109 provides a default rule that is overcome by a clear contrary legislative intent 51

2. Congress clearly expressed its intent that the FSA's revised penalties should apply immediately in post-enactment sentencings 53

Conclusion 56

Appendix 1a

TABLE OF AUTHORITIES

Cases:

Bradley v. *United States*, 410 U.S. 605 (1973) 51

DePierre v. *United States*, 131 S. Ct. 2225 (2011) 3, 25

Dillon v. *United States*, 130 S. Ct. 2683 (2010) 49

Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 26, 52

Cases—Continued: Page

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Great N. Ry. Co. v. *United States*, 208 U.S. 452 (1908) 24, 26, 52

Hertz v. *Woodman*, 218 U.S. 205 (1910) 53

Kimbrough v. *United States*, 552 U.S. 85 (2007) ... *passim*

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Neal v. *United States*, 516 U.S. 284 (1996) 34

Reynolds v. *United States*, No. 10-6549 (Jan. 23, 2012) .. 45

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United States v. *Douglas*:

  644 F.3d 39 (1st Cir. 2011) 19, 42, 49

  746 F. Supp. 2d 220 (D. Me. 2010), aff'd, 644 F.3d 39 (1st Cir. 2011) 47

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Cases—Continued: Page

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United States v. *Reisinger*, 128 U.S. 398 (1888) 52

United States v. *Rojas*, 645 F.3d 1234 (11th Cir. 2011), vacated on the grant of reh'g en banc, 659 F.3d 1055 (2011) 19

United States v. *Sidney*, 648 F.3d 904 (8th Cir. 2011) ... 19

United States v. *Tickles*, 661 F.3d 212 (5th Cir. 2011) ... 19

United States v. *Turner*, 548 F.3d 1094 (D.C. Cir. 2008) 29

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United States v. *Winebarger*, No. 11-1905, 2011 WL 6443156 (3d Cir. Dec. 23, 2011) 42

Warden v. *Marrero*, 417 U.S. 653 (1974) 26, 51, 52, 53

Constitution, statutes and guidelines:

U.S. Const. Art. I. § 10, Cl. 1 (Ex Post Facto Clause) ... 29

Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432 51

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  § 1, 109 Stat. 334 .... 8, 26, 50

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  § 2(a)(2), 109 Stat. 335 .... 8, 33

Statutes and guidelines—Continued: Page

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  - § 6452(a)(2), 102 Stat. 4371b . . . 5
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  - Pmbl., 124 Stat. 2372 . . . 12, 47
  - § 1, 124 Stat. 2372 . . . 12, 47
  - § 2, 124 Stat. 2372 . . . 12, 25, 32
  - § 3, 124 Stat. 2372 . . . 12, 26
  - § 4, 124 Stat. 2372 . . . 13
  - §§ 5-6, 124 Stat. 2373 . . . 13
  - § 7, 124 Stat. 2374 . . . 13
  - § 8, 124 Stat. 2374 . . . *passim*
  - § 9, 124 Stat. 2374 . . . 13
  - § 10, 124 Stat. 2375 . . . 13, 35
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Statutes and guidelines—Continued: Page

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18 U.S.C. 3553(a)(5) 54
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18 U.S.C. 3553(e) 41
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18 U.S.C. 3553(f)(5) 39
18 U.S.C. 3582(c) 49, 54
18 U.S.C. 3582(c)(2) 14, 49
21 U.S.C. 841(a)(1) 2, 14, 17
21 U.S.C. 841(b) 15, 22, 35
21 U.S.C. 841(b)(1) 25
21 U.S.C. 841(b)(1)(A) 4, 17
21 U.S.C. 841(b)(1)(A)-(C) (2006 & Supp. IV 2010) 4
21 U.S.C. 841(b)(1)(B) 4, 15, 38, 41
21 U.S.C. 841(b)(1)(B) (Supp. IV 2010) 16
21 U.S.C. 844(a) 5, 6, 35
21 U.S.C. 851(a)(1) (Supp. IV 2010) 14
28 U.S.C. 991(b)(1)(C) 54
28 U.S.C. 994(f) 55
28 U.S.C. 994(*o*) 55
28 U.S.C. 994(p) 13, 30
28 U.S.C. 994(r) 47
28 U.S.C. 994(u) 14, 49, 54

Guidelines—Continued: Page

United States Sentencing Guidelines:

§ 1B1.10 14
§ 1B1.11(b)(1) 29
§ 2D1.1(b)(1) 41
§ 2D1.1(b)(12) 41
§ 2D1.1(c) 38, 41
§ 5C1.2 39
§ 5G1.1(b) 33
Ch. 5, Pt. A 38, 39

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p. S10,491 46
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p. S1681 44
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p. H6198 46
p. H6199 44
p. H6202 .... 12, 46
p. H6204 44
60 Fed. Reg. 25,075-25,077 (1995) 7

Miscellaneous—Continued: Page

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  - pp. 28,571-28,573 10
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  - p. 66,188 13
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  - p. 66,191 ..... 14, 38
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  - p. 24,960 14
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      - (Feb. 1995) 4, 5, 6, 7, 25, 36
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In the Supreme Court of the United States

No. 11-5683

EDWARD DORSEY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 11-5271

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES SUPPORTING PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals in No. 11-5683 (Dorsey Pet. App. A1-A4) is reported at 635 F.3d 336. The order of the court of appeals denying rehearing (Pet. App. B1-B5) is reported at 646 F.3d 429.

The opinion of the court of appeals in No. 11-5721 (Hill Pet. App. A1-A2) is not published in the Federal Reporter but is available at 417 Fed. Appx. 560.

JURISDICTION

The judgment of the court of appeals in No. 11-5683 was entered on March 11, 2011. A petition for rehearing was denied on May 25, 2011. The petition for a writ of certiorari was filed on August 1, 2011, and was granted on November 28, 2011.

The judgment of the court of appeals in No. 11-5721 was entered on April 7, 2011. The petition for a writ of certiorari was filed on July 1, 2011, and was granted on November 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, as well as pertinent provisions of 21 U.S.C. 841; Section 21(a) of the Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266 (28 U.S.C. 994 note); and the Sentencing Guidelines, are set out in the appendix to this brief. App., *infra*, 5a-50a.

STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner Dorsey (No. 11-5683) was convicted on one count of possessing with intent to distribute 5.5 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner Hill (No. 11-5721) was convicted after a jury trial in the United States District Court for the Northern District of Illinois on one count of distributing 50 or more grams of crack cocaine, also in violation of 21 U.S.C. 841(a)(1). On August 3, 2010, after both petitioners had been convicted but before either had been sentenced, the President signed into law the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, which amended, *inter alia*, the drug quantities that trigger mandatory minimum penalties for trafficking in crack cocaine. In each case, the district court refused to sentence petitioner under the FSA and imposed a mandatory minimum sentence under pre-FSA law. The court of appeals affirmed.

I. STATUTORY BACKGROUND

Powder cocaine (cocaine hydrochloride) and crack cocaine (a form of cocaine base) are "two forms of the same drug": they contain the same active ingredient and produce the same physiological and psychotropic effects. *DePierre* v. *United States*, 131 S. Ct. 2225, 2228 (2011); *Kimbrough* v. *United States*, 552 U.S. 85, 94 (2007). Nonetheless, as this Court recently discussed, Congress required more than 20 years ago that offenses involving "cocaine base" be "handled very differently for sentencing purposes," resulting in sentences for crack cocaine offenders "three to six times longer than those for powder offenses involving equal amounts of drugs."[1] 552 U.S. at 94. After two decades of experience produced "almost universal criticism" of that sentencing disparity, U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (May 2007) (2007 Report), Congress enacted the FSA in 2010 "[t]o restore fairness to Federal cocaine sentencing." FSA Pmbl., 124 Stat. 2372.

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[1] The term "cocaine base" in Section 841(b)(1) is not limited to crack cocaine, but encompasses all varieties of "cocaine in its chemically basic form." *DePierre*, 131 S. Ct. at 2237.

A. Adoption Of The 100-to-1 Ratio

In the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, Congress created the basic tiered scheme of five- and ten-year mandatory minimum penalties for drug-trafficking offenses that remains in effect today. *Kimbrough*, 552 U.S. at 95. Under that scheme, both the maximum authorized punishment and the mandatory minimum term of incarceration increases with the drug quantity attributable to an offender. The threshold quantities required to trigger the mandatory minimum penalties vary by the drug. See generally 21 U.S.C. 841(b)(1)(A)-(C) (2006 & Supp. IV 2010).

The 1986 Act was adopted in a time of "great public concern" over the proliferation of crack cocaine, which was then a relatively new drug. *Kimbrough*, 552 U.S. at 95. "Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members' minds a problem of overwhelming dimensions." *Ibid.* (quoting U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 121 (Feb. 1995) (1995 Report)). Consequently, in setting the drug quantities that triggered the 1986 Act's mandatory minimum prison sentences, Congress adopted a 100-to-1 ratio that treated every gram of crack cocaine as equivalent to 100 grams of powder cocaine: for trafficking in 5 grams of crack cocaine or 500 grams of powder cocaine, the 1986 Act required a minimum sentence of five years in prison, see 21 U.S.C. 841(b)(1)(B) (2006); for offenses involving 50 grams of crack cocaine or 5 kilograms of powder cocaine, it imposed a mandatory minimum penalty of ten years, see 21 U.S.C. 841(b)(1)(A) (2006).

The United States Sentencing Commission (Sentencing Commission or Commission), which in 1986 was in the process formulating the first version of the Sentencing Guidelines, responded by incorporating the 100-to-1 ratio into the drug quantity table in Section 2D1.1(c) of the Guidelines. Using the statutory threshold quantities for five- and ten-year mandatory minimum sentences as "reference points," the Commission extrapolated upward and downward to derive proportional sentences for other drug quantities. 1995 Report 126; see *Kimbrough*, 552 U.S. at 96-97. Consequently, "[t]he 100-to-1 quantity ratio was maintained throughout the offense levels." 1995 Report 126.

In 1988, consistent with the 100-to-1 ratio, Congress added a mandatory term of life in prison for offenders who, having two prior felony drug convictions, distributed at least 50 grams of cocaine base or 5000 grams of powder cocaine. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(2), 102 Stat. 4371. In the same Act, Congress adopted a mandatory minimum penalty of five years of imprisonment for the simple possession of crack cocaine—the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. § 6371, 102 Stat. 4370 (21 U.S.C. 844(a) (2006)); see 1995 Report 123-125.

B. The Sentencing Commission's Escalating Criticism Of The 100-to-1 Ratio

The adoption of a 100-to-1 ratio in the treatment under federal law of "two easily convertible forms of the same drug" produced a variety of "extreme anomalies in sentencing." 1995 Report 197. Because of that ratio, for example, a major trafficker in powder cocaine could receive a shorter prison sentence than the street-level dealers who bought from that trafficker and converted the powder cocaine to crack. See *Kimbrough*, 552 U.S. at 95. Indeed, under the 100-to-1 ratio, the amount of powder cocaine required to trigger a five-year mandatory minimum prison sentence for a single powder offender—500 grams—could be converted into enough crack cocaine to trigger the same five-year mandatory minimum sentence for 89 crack offenders.[2] 1995 Report 160. The mandatory minimum penalty for simple possession of crack cocaine generated similarly striking anomalies. A first-time conviction for the simple possession of five grams of crack cocaine, for example, triggered a mandatory minimum penalty of five years in prison and a maximum of 20 years. See 21 U.S.C. 844(a) (2006). By contrast, the *maximum* penalty for the first-time simple possession of *any* quantity of powder cocaine was one year in prison, and many such offenders avoided incarceration altogether. *Ibid.*; see 1995 Report 151. It soon became apparent, moreover, that the impact of these sentencing disparities fell disproportionately on racial minorities. See *id.* at 192 (finding that minorities constitute "the vast majority of those persons most affected by such an exaggerated ratio").

These and other sentencing anomalies created by the 100-to-1 ratio generated a chorus of criticism. See 1995 Report 1. In 1994, Congress responded by directing the Sentencing Commission to prepare a report describing "the differences in penalty levels that apply to different forms of cocaine" and "any recommendations that the Commission may have for retention or modification of such differences in penalty levels." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 2097. The Commission eventually issued four separate reports, each of which concluded that the 100-to-1 ratio could not be justified and that congressional action was required.

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[2] One gram of pure powder cocaine converts to approximately 0.89 grams of crack cocaine. 1995 Report 14.

1. In February 1995, in response to the 1994 congressional directive, the Sentencing Commission published a comprehensive report on federal sentencing policy for cocaine offenses. See 1995 Report. After reviewing the available empirical data in light of the policy concerns that originally animated Congress's adoption of heightened penalties for crack cocaine, see *id.* at 146-160, 180-195, the Commission "strongly recommend[ed] against a 100-to-1 quantity ratio." *Id.* at 198. The Commission explained that its "central basis" for rejecting the 100-to-1 ratio was the creation of "extreme anomalies in sentencing produced by such a high differential in penalties between two easily convertible forms of the same drug." *Id.* at 197. The Commission similarly found that the mandatory minimum penalty for simple possession of crack cocaine had "created sentencing anomalies and unwarranted disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act [of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987]." 1995 Report 198.

Shortly thereafter, the Sentencing Commission proposed an amendment to the Guidelines that would have implemented a 1-to-1 quantity ratio for crack and powder cocaine offenses. See 60 Fed. Reg. 25,075-25,077 (1995). Congress disapproved the amendment, expressing its sense that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine." Act of Oct. 30, 1995, Pub. L. No. 104-38, §§ 1 & 2(a)(1)(A), 109 Stat. 334. But at the same time, Congress directed the Sentencing Commission to "propose [a] revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)]." § 2(a)(2), 109 Stat. 335. In the accompanying House committee report, legislators acknowledged that "the current 100-to-1 quantity ratio may not be the appropriate ratio." H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995). The committee expressed concern, however, that amending the Sentencing Guidelines for crack cocaine offenses without changing the corresponding mandatory minimum penalties would "create gross sentencing disparities," because "[s]entences just below the statutory minimum would be drastically reduced, but mandatory minimums would remain much higher." *Ibid.*

2. The Sentencing Commission responded in 1997 with a report in which it "firmly and unanimously" reiterated its conclusion that, "although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997) (1997 Report). The Commission particularly urged that the five-gram quantity trigger for a five-year minimum sentence for crack cocaine offenders was "too low," *id.* at 7, and emphasized that the racially disparate impact of the 100-to-1 penalty resulted in a widespread "perception of unfairness and inconsistency" in federal sentencing, *id.* at 8. The Commission accord-

ingly recommended that Congress adopt a ratio of approximately 5-to-1. *Id.* at 9.

3. In 2002, after Congress failed to act, the Sentencing Commission issued an updated report in which it "again unanimously and firmly conclude[d]" that the 100-to-1 ratio should be "decreas[ed] substantially." U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (May 2002) (2002 Report). The Commission—which by 2002 no longer included any of the commissioners who had authored the earlier reports, see *id.* at 1 n.4—explained that "[t]he 100-to-1 drug quantity ratio was established based on a number of beliefs" about the dangers of crack cocaine "that more recent research and data no longer support." *Id.* at 91. As a result, the Commission concluded, "the offense seriousness of most crack cocaine offenders is overstated," and "a differential this extreme is unjust." *Id.* at 100. Furthermore, "[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000." *Id.* at 102. Thus, the Commission concluded, to the extent that the 100-to-1 ratio "results in unduly severe penalties for most crack cocaine offenders, the effects of that severity fall primarily upon black offenders." *Id.* at 103.

The Commission accordingly proposed "a three-pronged approach for revising federal cocaine sentencing policy": (i) increase the threshold quantities of crack cocaine required to trigger statutory penalties in order to achieve at most a 20-to-1 ratio; (ii) in exchange, adopt new sentencing enhancements targeted at the most serious drug offenders; and (iii) maintain the same trigger quantities for powder cocaine offenders, understanding that the new sentencing enhancements would in practical effect increase the penalty for many powder traffickers as well. 2002 Report viii. The Commission also "unanimously reiterate[d]" its prior finding that the five-year mandatory minimum penalty for simple possession of crack cocaine "is unjustified and should be repealed." *Id.* at 109.

4. Finally, in 2007, the Commission determined that "the problems associated with the 100-to-1 drug quantity ratio" were "so urgent and compelling" that the Commission would "partially address some of the problems" on its own. 2007 Report 9. The Commission announced that it would amend the drug quantity table in Section 2D1.1(c) of the Guidelines to reduce the base offense level for crack cocaine offenses by two levels. See 72 Fed. Reg. 28,571-28,573 (2007). This had the effect of providing Guidelines ranges that included (rather than exceeded) the statutory minimum penalties, but still continued to "fit within the existing statutory penalty scheme." 72 Fed. Reg. at 28,573. The Commission emphasized that it viewed this change "only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio" and that "[a]ny comprehensive solution" would require legislative action. *Ibid.*

The Commission then issued a fourth report in which it "unanimously and strongly urge[d] Congress to act promptly" to revise the 100-to-1 ratio and repeal the mandatory minimum penalty for simple possession. 2007 Report 8. The Commission reaffirmed the "core findings" from its previous reports, *id.* at 7, including (1) that the 100-to-1 ratio "overstate[s] the relative harmfulness of crack cocaine"; (2) that the mandatory minimum penalties for crack cocaine offenses "sweep too broadly and apply most often to lower level offenders";

(3) that the penalty scheme "fail[s] to provide adequate proportionality"; and (4) that "[t]he current severity of crack cocaine penalties mostly impacts minorities." *Id.* at 8. "Based on these findings," the Commission reiterated its conclusion that "the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act." *Ibid.*

The Commission observed that this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), had engendered significant litigation over "whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio," which was by then the target of "almost universal criticism." 2007 Report 1, 2. Cf. *Spears* v. *United States*, 555 U.S. 261, 265-266 (2009) (per curiam) (reaffirming that, after *Booker* and *Kimbrough*, "district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines"). The Commission urged that, rather than permit inconsistent, case-by-case variations from the statutory ratio, Congress should enact "a uniform remedy to the problems created by the 100-to-1 drug quantity ratio" that would "better promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records." 2007 Report 1-2.

Finally, the Commission urged Congress to include in any legislation implementing its recommendations a grant of "emergency amendment authority" to permit the Commission to "incorporate the statutory changes in the federal sentencing guidelines." 2007 Report 9. Such emergency authority, the Commission explained, "would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders." *Ibid.*

C. The Fair Sentencing Act

The President signed the Fair Sentencing Act into law on August 3, 2010. Entitled an act "[t]o restore fairness to Federal cocaine sentencing," Pmbl., 124 Stat. 2372, the FSA essentially implements the Sentencing Commission's 2002 proposal for cocaine sentencing reform. See 2002 Report 104; accord 2007 Report 8 & n.26. The FSA passed the Senate by unanimous consent and the House by voice vote.

Section 2 of the Act, entitled "Cocaine Sentencing Disparity Reduction," increases the threshold quantities of crack cocaine required to trigger five- and ten-year mandatory minimum penalties from 5 and 50 grams to 28 and 280 grams, respectively, leaving the corresponding quantities of powder cocaine unchanged at 500 and 5000 grams. 124 Stat. 2372. The FSA thus replaces the 100-to-1 ratio with a ratio of approximately 18-to-1.[3]

Section 3 of the FSA repeals the mandatory minimum sentence for simple possession of crack cocaine. 124 Stat. 2372.

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[3] Congress's selection in the FSA of 28 grams as the trigger for the five-year mandatory minimum penalty appears to reflect evidence that wholesale crack distributors typically trade in quantities of one ounce (*i.e.*, approximately 28 grams) or more. See 2007 Report 18, 84 n.124; see also 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (Rep. Lungren) ("According to narcotics officers I have spoken with, you want to reach the wholesale and mid-level traffickers who often trafficked in 1-ounce quantities. That is why [the FSA] would raise the amount of crack cocaine necessary to trigger a mandatory 5-year sentence from 5 grams to 28 grams, which is close to the 1 ounce.").

Sections 4 through 6 of the FSA implement the Commission's recommendation to adopt targeted increases in penalties for more culpable offenders. See 2002 Report 104. The Act thus substantially increases the maximum fines permitted for drug-trafficking offenses, § 4, 124 Stat. 2372-2373, and directs the Sentencing Commission to review and amend the Guidelines to ensure an additional enhancement is provided for certain conduct during drug-trafficking crimes, such as the use of violence or the distribution of drugs to unusually vulnerable persons, §§ 5-6, 124 Stat. 2373-2374. Section 7 of the FSA directs the Commission to cap or reduce the base offense level for defendants who receive a minimal role adjustment. 124 Stat. 2374. Sections 9 and 10 require certain reports to Congress, including a report within five years of the Act's passage on the "impact" of its changes. 124 Stat. 2374-2375.

Finally, Congress granted "emergency authority" to the Sentencing Commission to implement the FSA immediately and "conform[]" the Guidelines to "applicable law." § 8, 124 Stat. 2374. The Act thus not only permits the Commission to dispense with the 180-day period for congressional review of Guidelines amendments normally required under 28 U.S.C. 994(p), but specifically directs the Commission to act "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act." § 8, 124 Stat. 2374.

D. The Emergency Guidelines Amendments

The Sentencing Commission complied with Congress's directive in Section 8 of the FSA by issuing emergency Guidelines amendments that became effective on November 1, 2010. 75 Fed. Reg. 66,188 (2010). Among other changes, the Commission amended the relevant crack cocaine quantities in the Drug Quantity Table in Section 2D1.1(c), which specifies the base offense level for trafficking offenses involving particular amounts of drugs, to reflect the FSA's 18-to-1 ratio. See *id.* at 66,189, 66,191. Under the Sentencing Reform Act, these amended Guidelines became immediately effective in all initial sentencing proceedings conducted on and after November 1, 2010, regardless of the date of the underlying offense. See 18 U.S.C. 3553(a)(4)(A)(ii).[4]

II. THE PRESENT CONTROVERSIES

A. *Dorsey* (No. 11-5683)

1. In August 2008, petitioner Dorsey was arrested after selling crack cocaine to a government informant at a motel in Kankakee, Illinois. Dorsey J.A. 48-49. A federal grand jury in the Central District of Illinois indicted petitioner on one count of possessing with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Dorsey J.A. 9. The government subsequently filed a notice under 21 U.S.C. 851(a)(1) stating that petitioner was subject to enhanced statutory penalties because he had previously been convicted of two felony drug offenses. Dorsey J.A. 11-12.

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[4] The Commission later submitted to Congress a permanent version of the emergency FSA Guidelines amendments. See 76 Fed. Reg. 24,960 (2011). Congress did not intervene, and the permanent amendments became effective on November 1, 2011. See *ibid.* The Commission also determined, pursuant to its authority under 28 U.S.C. 994(u), that the amended Guidelines would be made retroactively applicable to offenders already serving terms of imprisonment for crack cocaine offenses. 76 Fed. Reg. 41,333-41,334 (2011); see 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10.

In April 2010, petitioner waived his right to a jury trial and stipulated that he had knowingly possessed crack cocaine with the intent to distribute. See 09-cr-20003 Docket entry Nos. 14, 16 (C.D. Ill. Apr. 9, 2010). The district court scheduled a bench trial to determine the amount of crack cocaine petitioner had possessed. On June 3, 2010, the day of the scheduled trial, petitioner elected to enter an open plea of guilty. See Dorsey J.A. 21. During his plea colloquy, petitioner admitted to possessing 5.5 grams of crack cocaine at the time of his arrest. *Id.* at 29, 46-48. Petitioner also acknowledged that, given his prior felony drug convictions, he faced a mandatory minimum penalty of ten years in prison under the law then in effect. *Id.* at 41-43; see 21 U.S.C. 841(b)(1)(B) (2006).

2. At his sentencing hearing on September 10, 2010, petitioner urged the district court to apply the revised penalty scheme provided by the FSA, which had become effective one month earlier. See Dorsey J.A. 54-55, 69, 70. Because the Sentencing Commission had not yet issued its emergency Guidelines amendments, it was undisputed that the court would apply the pre-FSA Guidelines. See 18 U.S.C. 3553(a)(4)(A)(ii). But under the FSA, petitioner would face no mandatory minimum penalty because he possessed less than 28 grams of crack cocaine. See 21 U.S.C. 841(b)(1)(B) (Supp. IV 2010). Consequently, petitioner would be free to argue for a sentence substantially lower than what the pre-FSA Guidelines would otherwise advise. See *Spears*, 555 U.S. at 265-266.

The district court rejected petitioner's request and sentenced him under the version of 21 U.S.C. 841(b) in effect at the time of his offense. See Dorsey J.A. 70. Because petitioner's advisory Guidelines range was below the pre-FSA mandatory minimum penalty of ten years, see *id.* at 67-68, the district court sentenced petitioner to serve 120 months in prison, *id.* at 80, 85.

3. The court of appeals affirmed. Dorsey Pet. App. A1-A4. The court consolidated petitioner's appeal with that of another crack cocaine offender, Anthony Fisher, who had been both convicted and sentenced before the enactment of the FSA. The court of appeals concluded that Fisher's effort to invoke the FSA was foreclosed by the court's earlier decision in *United States* v. *Bell*, 624 F.3d 803 (7th Cir. 2010), cert. denied, 131 S. Ct. 2121 (2011), which had held that the general federal saving statute, 1 U.S.C. 109, prevents offenders who were sentenced before August 3, 2010, from challenging their sentences based on the amendments made by the FSA. Dorsey Pet. App. A3; see *Bell*, 624 F.3d at 814-815. Section 109 provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law "unless the repealing Act shall so expressly provide." 1 U.S.C. 109.

The court of appeals then rejected petitioner's argument that, notwithstanding Section 109, the FSA's text and history "necessar[ily] impl[y] that the FSA must be applied * * * to sentences imposed *after*" the date the FSA became effective, regardless of when the offense occurred. Dorsey Pet. App. A3 (emphasis added). Concluding that Congress failed to "drop[]" any "hint" that it "wanted the FSA * * * to apply to not-yet-sentenced defendants convicted on pre-FSA conduct," the court of appeals declared that "the FSA does not apply retroactively" and that "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Id.* at A4.

B. *Hill* (No. 11-5721)

1. In March 2007, petitioner Hill sold approximately 53.3 grams of crack cocaine to a government informant. Hill Presentence Investigation Report (PSR) 4. In June 2008, he was arrested, and a federal grand jury in the Northern District of Illinois returned a one-count indictment charging him with distributing 50 grams or more of cocaine base in violation of 21 U.S.C. 841(a)(1). PSR 3; see Hill J.A. 6. After a jury trial in April 2009, petitioner was convicted. *Id.* at 83.

2. At petitioner's sentencing hearing on December 2, 2010, the district court stated that, in the absence of an applicable mandatory minimum, the court would have sentenced petitioner to serve 51 months in prison. Hill J.A. 69. The court recognized, however, that the amount of crack cocaine involved in petitioner's offense (53.3 grams) subjected him to a mandatory minimum sentence. *Ibid.* Under the law in effect at the time of petitioner's offense, the mandatory minimum sentence for distributing 50 or more grams of crack cocaine was ten years of imprisonment. See 21 U.S.C. 841(b)(1)(A) (2006). After the FSA, however, the mandatory minimum penalty for the same quantity is five years in prison. See 21 U.S.C. 841(b)(1)(B) (Supp. IV 2010).

Petitioner argued that Congress intended the FSA to apply in all sentencing proceedings after the effective date of the Act. Hill J.A. 64-68. The district court indicated that it might have agreed with petitioner and imposed the post-FSA mandatory minimum sentence of 60 months, but it believed it was precluded under Seventh Circuit precedent from applying the FSA to pre-enactment offenders. *Id.* at 63, 68-69. The court therefore sentenced petitioner to serve 120 months in prison, the mandatory minimum penalty under pre-FSA law. *Id.* at 78, 85.

3. The court of appeals affirmed. Hill Pet. App. A1-A2. In an unpublished order, the court concluded that petitioner's sole argument on appeal—that the FSA "should apply to any defendant sentenced after its enactment, even if the underlying crime was committed before"—was foreclosed by the court's decision in petitioner Dorsey's case. *Id.* at A2.

C. Subsequent Proceedings

1. Petitioner Dorsey sought rehearing en banc, which the court of appeals denied. Dorsey J.A. 103-115. Judge Williams, joined by Judge Hamilton, dissented. She concluded that 1 U.S.C. 109 was inapplicable because the "fair implication" of the FSA, as revealed in Section 8 of the Act, was that Congress intended "to have the FSA apply to those individuals yet to be sentenced." Dorsey J.A. 107-108, 111. Judge Williams explained that Congress was aware that the new emergency Guidelines would apply immediately in pending cases, and she reasoned that Congress's desire to ensure "'consistency' between the guidelines and the statute * * * signals an intent to apply the FSA to pending cases just as the guidelines would be." *Id.* at 108.

2. At the time of the decisions below, the position of the United States was that 1 U.S.C. 109 required that pre-enactment offenders, such as petitioners, remain subject to the pre-FSA mandatory minimum penalty scheme because Section 109 "requires Congress to 'expressly provide' for retroactive application of an ameliorative penalty provision in order to avoid the default rule" (emphasis omitted) and "[t]he FSA con-

tains no such provision." 11-5683 Gov't C.A. Br. 14. In July 2011, however, the United States revisited its position in light of differing judicial decisions on the application of the FSA to pre-enactment offenders in post-FSA sentencings. Compare, *e.g.*, Dorsey Pet. App. A2-A4 (FSA inapplicable) with, *e.g.*, *United States* v. *Douglas*, 644 F.3d 39, 42-44 (1st Cir. 2011) (FSA mandatory minimum penalties apply in all initial sentencings following the November 1, 2010 emergency Guidelines amendments).[5] In a memorandum issued to all federal prosecutors on July 15, 2011, the Attorney General concluded that, while the FSA does not apply to sentences already imposed, the Act's "new mandatory minimum sentencing provisions [apply] to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place." App., *infra*, 3a. Federal prosecutors advised the courts, including the court of appeals below, of the revised view of the United States.

3. Following the Attorney General's decision, the Seventh Circuit considered whether to grant rehearing en banc to overrule the decision below in No. 11-5683. The court divided evenly and thus denied rehearing en banc. *United States* v. *Holcomb*, 657 F.3d 445 (7th Cir. 2011).

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[5] The Third Circuit later held that the FSA applies in all post-FSA sentencings, *United States* v. *Dixon*, 648 F.3d 195, 203 (2011), as did a panel of the Eleventh Circuit in *United States* v. *Rojas*, 645 F.3d 1234, 1236, vacated on the grant of rehearing en banc, 659 F.3d 1055 (2011). The Fifth and Eighth Circuits, in contrast, held that the FSA's statutory penalties apply only to post-FSA conduct. *United States* v. *Tickles*, 661 F.3d 212, 215 (5th Cir. 2011); *United States* v. *Sidney*, 648 F.3d 904, 910 (8th Cir. 2011).

a. Chief Judge Easterbrook, joined by four members of the court, voted to deny rehearing. He recognized that Congress can override Section 109, and apply a new ameliorative law to pre-enactment conduct, without an "express" provision to that effect. *Holcomb*, 657 F.3d at 448. He believed, however, that a law cannot be "partial[ly] retroactiv[e]" under Section 109 and that, therefore, to say that the FSA is "not fully retroactive is to say that Congress did *not* supersede § 109." *Ibid.* He also concluded that Congress's directive to the Commission in Section 8 of the FSA, "which tells the Commission to get a move on in revising its Guidelines, does not imply anything about when the new minimum and maximum sentences go into force." *Id.* at 450.

b. Judge Williams, also joined by four members of the court, dissented. She explained that "[o]nly one reasonable implication can be drawn from section 8 of the Act," which requires the Commission to exercise emergency authority to issue "conforming amendments" to the Guidelines as necessary "to achieve consistency with other guideline provisions and applicable law." *Holcomb*, 657 F.3d at 456. Because Congress was aware that sentencing courts use the Guidelines in effect on the day of sentencing, 18 U.S.C. 3553(a)(4)(A)(ii), she reasoned, Congress must have intended new Guidelines based on an 18-to-1 ratio to "take effect right away, even in sentencings where the offender's conduct pre-dated the Act." 657 F.3d at 456. It would make no sense, Judge Williams explained, for such defendants nevertheless to be "subject to pre-FSA 100:1 mandatory minimums." *Ibid.* That result, she argued, does not achieve the "consistency" between the Guidelines and "applicable law" that Congress required; "[i]t achieves the opposite." *Id.* at 457. Accordingly, "[t]he necessary implication of the [FSA] is that its mandatory minimums apply in all sentencings after its passage." *Id.* at 459-460.

c. Judge Posner, in addition to joining Judge Williams's opinion, filed his own dissent from the denial of rehearing en banc. He emphasized that "unless the Act's revised mandatory minimum sentences are also applicable" to offenders sentenced under the amended Guidelines, those offenders "will receive sentences in excess of the sentencing guidelines that Congress * * * intended would apply to such defendants." *Holcomb*, 657 F.3d at 462. That result would thwart Congress's direction to "the Sentencing Commission to make haste to conform [the Guidelines] to the new, more lenient statutory minimums." *Ibid.* Judge Posner illustrated these "perverse results" with tables demonstrating that, for many defendants, the pre-FSA mandatory minimums would render the new Guidelines of no consequence—a "senseless" outcome. *Id.* at 461 (citation omitted).

SUMMARY OF ARGUMENT

Congress enacted the Fair Sentencing Act to remove from federal sentencing law the disproportionate and racially disparate sentencing effects of the 100-to-1 ratio. It therefore directed the Sentencing Commission to conform the Guidelines to the new "applicable law" in the amended statutory provisions "as soon as practicable." FSA § 8, 124 Stat. 2374. The text and structure of the FSA, together with its history and purposes, make clear that, notwithstanding the general federal saving statute, 1 U.S.C. 109, Congress intended the FSA's revised mandatory minimums to be effective immediately in sentencing proceedings following its enactment. Petitioners, who had not yet been sentenced when the FSA became law, were entitled to be sentenced according to its terms.

A. Congress expressed its intent to make its repeal of the 100-to-1 ratio immediately effective by directing the Sentencing Commission to issue "emergency" "conforming amendments" "as soon as practicable" to "achieve consistency" between the Sentencing Guidelines and "applicable law." Congress understood that, under the framework for federal sentencing determinations established by the Sentencing Reform Act, courts must impose a sentence in light of the Sentencing Guidelines that "are in effect on the date the defendant is sentenced," irrespective of the date of the underlying conduct. 18 U.S.C. 3553(a)(4)(A)(ii). By directing the Commission to implement the FSA "as soon as practicable" by "conforming" the Guidelines to "applicable law," Congress clearly expressed its intent that the FSA's revised penalty scheme should be given effect in all initial sentencing proceedings after the date of its enactment. Congress understood that to repeal the 100-to-1 ratio without amending both the statutory mandatory minimum penalties and the Guidelines would introduce needless and unjustifiable incongruities into the law. Accordingly, Congress amended the statutory penalties in 21 U.S.C. 841(b) and directed the Commission to conform the Guidelines to those amendments "as soon as practicable," so that a revised drug quantity table would not unnecessarily lag *behind* the statutory reforms.

As Congress additionally understood, it would make little sense to require the Commission to incorporate the 18-to-1 ratio into emergency Guidelines if the pre-FSA mandatory minimums would remain "applicable law" for the thousands of pre-enactment offenders who would be sentenced under those emergency Guidelines. The resulting scheme would produce gross incongruities in sentences and would perpetuate the very evils Congress sought to eradicate. Indeed, for a wide variety of common drug quantities, the pre-FSA mandatory minimums would override the *entire* post-FSA Guidelines range, rendering the Guidelines that Congress directed the Commission to promulgate "as soon as practicable" essentially irrelevant.

B. The history and purposes of the Fair Sentencing Act underscore that Congress intended its repeal of the 100-to-1 ratio to be immediately effective. The evolution of the FSA informs the interpretation of the enacted text in two respects. First, Congress specifically considered and deleted from an early version of the legislation a provision that would have confined the FSA's effect to post-enactment offense conduct only, thus implying that no such limitation was intended. Second, the debates preceding the enactment of the FSA—which passed the Senate unanimously and the House by voice vote—make plain that Congress had no further tolerance for the severely disproportionate impact of the 100-to-1 ratio on racial minorities. Requiring district courts to continue to impose mandatory minimum sentences based on that discredited ratio for years into the future would directly conflict with Congress's core purpose in the Fair Sentencing Act: to restore fairness in cocaine sentencing by setting aside assumptions about the risks associated with crack cocaine that were, by 2010, universally recognized to be mistaken. While Congress respected finality principles by declining to disrupt sentences already imposed (thereby avoiding the significant costs to the criminal justice system that would attend full-scale resentencings), it left no doubt that it intended to purge federal law of the racially disproportionate effects of the discredited 100-to-1 policy.

C. The default rule in 1 U.S.C. 109 does not require a different result. Section 109 reverses the common law rule of technical abatement and establishes a default presumption that federal liability incurred when a person violates an Act of Congress is not extinguished by the modification or repeal of the law regulating his conduct or prescribing the appropriate penalty. Because one legislature cannot bind the powers of a future legislature, however, the default rule created by Section 109 may be overcome if Congress indicates a contrary intent in a later statute, whether expressly or by "necessary implication." *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908). Although the FSA is the sort of ameliorative legislation that triggers an inquiry under Section 109, Congress made clear its intention that the FSA's new mandatory minimum penalty provisions should apply immediately in all initial sentencing proceedings. At the same time, Section 109 preserves sentences already imposed at the time of the FSA's enactment: Congress gave no indication that it wished to incur the costs associated with full-scale resentencings. That congressional framework, which is consistent with the normal operation of the Sentencing Reform Act, should be enforced.

ARGUMENT

THE FAIR SENTENCING ACT APPLIES IN ALL INITIAL SENTENCING PROCEEDINGS AFTER ITS ENACTMENT

The Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, rectifies a glaring disparity in federal criminal law that produced "disproportionately harsh sanctions" for crack cocaine offenses for more than 20 years. *Kimbrough* v. *United States*, 552 U.S. 85, 110 (2007). Congress adopted the 100-to-1 ratio in 1986 because it believed crack cocaine to be exponentially more potent, addictive, and dangerous than powder cocaine: "Congress faced what it perceived to be a new threat of massive scope." *DePierre* v. *United States*, 131 S. Ct. 2225, 2235 (2011). In fact, the massive threat never materialized, and the factual assumptions that drove Congress to enact the 100-to-1 ratio proved to be unfounded. See *Kimbrough*, 552 U.S. at 97-98; 2002 Report 91. Yet the 100-to-1 ratio remained embedded in federal law, generating "extreme anomalies in sentencing" (1995 Report 197) that disproportionately imposed severe mandatory minimum penalties on racial minorities. See 2007 Report 8.

In the FSA, Congress finally accepted the recommendation of the Sentencing Commission to reduce the crack/powder ratio in 21 U.S.C. 841(b)(1) and provide emergency authority for the Commission to coordinate the Guidelines with the new drug quantity thresholds for the statutory minimum penalties. Thus, the Act more than quintupled the threshold quantities of crack cocaine necessary to trigger mandatory minimum prison terms, replacing the 100-to-1 ratio with a new ratio of approximately 18-to-1. FSA § 2, 124 Stat. 2372. It repealed the five-year mandatory minimum penalty for simple possession of crack cocaine. § 3, 124 Stat. 2372. And it directed the Sentencing Commission to implement these changes "as soon as practicable" in "emergency" Guidelines amendments that would "achieve consistency" between the Guidelines and "applicable law." § 8, 124 Stat. 2374.

The FSA became effective when the President signed the Act into law on August 3, 2010. *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 404 (1991) ("[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment."). The general federal saving statute, 1 U.S.C. 109, provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law "unless the repealing Act shall so expressly provide." The FSA does not expressly state that the amended provisions of 21 U.S.C. 841(b) will apply in sentencing proceedings for pre-enactment offenders. But Congress nevertheless made its intent plain in the FSA, and that intent controls notwithstanding Section 109's express-statement rule because "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). As this Court has explained, and as all members of the court of appeals recognized, see *United States* v. *Holcomb*, 657 F.3d 445, 448 (7th Cir. 2011) (opinion of Easterbrook, C.J.); *id.* at 455 (opinion of Williams, J.), the default rule supplied by Section 109 has no application whenever Congress has expressed a different intention, "either expressly or by necessary implication, in a subsequent enactment." *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908); see also *Warden* v. *Marrero*, 417 U.S. 653, 659 n.10 (1974) ("by fair implication"). Because Congress made clear in the FSA that it intended the

Act's reforms to have immediate effect, petitioners were entitled to be sentenced according to its terms. The judgment of the court of appeals in these cases must be reversed.

A. The Text, Structure, And Background Of The FSA Demonstrate Congress's Intent To Give The Act's Reforms Immediate Effect

Congress expressed its intent to make its repeal of the 100-to-1 ratio immediately effective in post-FSA sentencings by directing the Sentencing Commission to issue "emergency" conforming amendments to the Sentencing Guidelines "as soon as practicable" to "achieve consistency" between the Guidelines and "applicable law." FSA § 8, 124 Stat. 2374. That directive, in the context of the surrounding structure of federal sentencing law, is incompatible with the court of appeals' belief that Congress intended district courts to continue imposing mandatory minimum sentences under pre-FSA law.

1. *Congress directed the Sentencing Commission to conform the Guidelines to "applicable law," which meant the FSA's new penalty scheme*

Congress enacted the sentencing reforms in the FSA against the backdrop of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, which established the basic framework for all federal sentencings. Under that framework, sentencing courts must consult the Sentencing Guidelines that "are in effect on the date the defendant is sentenced," irrespective of the date of the underlying conduct. 18 U.S.C. 3553(a)(4)(A)(ii). Although the Guidelines are no longer binding, see *United States* v. *Booker*, 543 U.S. 220 (2005), this Court has made clear that a sentencing court must still consider the advice of the Sentencing Commission at the time the sentence is imposed. *Id.* at 245-246; see, *e.g.*, *Gall* v. *United States*, 552 U.S. 38, 49 (2007) ("[T]he Guidelines should be the starting point and the initial benchmark.").

By directing the Sentencing Commission to implement the FSA "as soon as practicable" through amendments that "conform[ed]" the Guidelines to "applicable law," Congress necessarily implied that the FSA's 18-to-1 penalty scheme should be given effect prospectively in *all* initial sentencing proceedings, irrespective of the date of the underlying offense conduct. In instructing the Commission to conform the Guidelines to "applicable law," Congress necessarily meant the FSA, because the then-existing Guidelines would *already* have reflected pre-FSA sentencing law: the only "conforming amendments" necessary were those required to bring the Guidelines into alignment with the FSA itself. And by directing the Commission to "conform[]" the Guidelines to the FSA, Congress instructed the Commission to harmonize the Guidelines with the statutory penalty scheme so that the two systems would function as a logical, consistent, and coherent whole. See, *e.g.*, *Webster's New Int'l Dictionary of the English Language* 561 (2d ed. 1958) ("conform" means "[t]o shape in accordance with," to "make like," or "to bring into harmony or agreement"). Congress directed the Commission to take this step, moreover, knowing that the resulting Guidelines amendments would apply immediately in all initial sentencing proceedings, including those involving offenses that predated the FSA.[6] 18 U.S.C. 3553(a)(4)(A)(ii).

The exceptional urgency of Congress's directive to the Commission in Section 8 confirms that Congress intended its repeal of the 100-to-1 ratio to be immediately effective in post-FSA sentencings. Congress gave the Commission at most 90 days to promulgate amended Guidelines. If it had believed that the Act's most significant reform—the altered mandatory minimum penalty structure—would apply only to post-Act offenders, it would have had little reason to require the Commission to act with such dispatch. While changes in the Guidelines regime would go into effect immediately and thus provide advice to sentencing courts, those courts already had—and were exercising—the authority to "reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines." *Spears* v. *United States*, 555 U.S. 261, 265-266 (2009) (per curiam); see also 2007 Report 1-2. The innovation of the FSA, as Congress well understood, was to reduce *statutory* barriers to fairer sentences.

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[6] The Guidelines recognize an exception to this rule for circumstances in which applying the Guidelines in effect on the date of sentencing would violate the Ex Post Facto Clause of the Constitution. See Sentencing Guidelines § 1B1.11(b)(1). Even assuming *arguendo* that the Ex Post Facto Clause applies to advisory Guidelines, that Clause would have no application to changes that *decreased* an offender's advisory Guidelines range, as would be true for vast numbers of crack offenders under the FSA. Accordingly, Congress would have had no reason to doubt that, under Section 3553(a)(4)(A)(ii), the emergency Guidelines amendments required by the FSA would be applicable for most or all crack offenders no later than 90 days after enactment. FSA § 8, 124 Stat. 2374. In any event, in the government's view, the advisory nature of the Guidelines after *Booker* removes any ex post facto concerns, as the Seventh Circuit has correctly held. *United States* v. *Demaree*, 459 F.3d 791, 794-795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007). But see *United States* v. *Wetherald*, 636 F.3d 1315, 1321-1322 (11th Cir.) (advisory Guidelines can violate the Ex Post Facto Clause on an as-applied basis if they present a "substantial risk" of a more severe sentence), cert. denied, 132 S. Ct. 360 (2011); *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); *United States* v. *Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States* v. *Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008). No ex post facto issues are presented in this case.

On the court of appeals' theory, Congress would have had no urgent need to accelerate the Commission's normal procedures, under which amendments to the Guidelines may become effective six months after their submission to Congress. See 28 U.S.C. 994(p). The statute of limitations for federal drug offenses is five years. 18 U.S.C. 3282. Given the time required to discover, investigate, and prosecute drug crimes, even an offender who committed a crack cocaine offense on the day the FSA became law probably would not face sentencing for a year or longer.[7] Indeed, if Congress had intended district courts to continue to sentence pre-enactment offenders under the law in effect at the time of the offense, it would have been more sensible for Congress to *withhold* emergency amendment authority from the Commission. Prior law would then have continued to govern prior conduct while the Commission formulated and proposed its amendments.

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[7] At the time of the FSA's enactment, the median time between indictment and sentencing for federal drug offenses (other than marijuana offenses) was approximately 11 months. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Tbl. D-10, at 272 (2010). And a significant delay often occurs between the commission of the offense and the defendant's arrest, even when the arrest results from a controlled drug purchase. Petitioner Hill, for example, committed his offense 15 months before he was arrested. See Hill PSR 3-4. Additional delay may also occur between arrest and indictment. See 18 U.S.C. 3161(b) (government may bring charges at any time up to 30 days after the defendant's arrest).

But Congress was not satisfied to wait. Instead, in Section 8 of the FSA, it (i) revived the Commission's expired authority under former Section 21(a) of the Sentencing Act of 1987 to issue emergency Guidelines amendments without waiting for congressional approval; (ii) directed the Commission to exercise that authority "as soon as practicable"; and (iii) specified that "in any event," the Commission was required to issue its amended Guidelines "not later than 90 days after the date of enactment of this Act." 124 Stat. 2374. The natural inference is that Congress intended the FSA's integrated package of reforms—new Guidelines implementing the new "applicable law"—to govern the sentencing of pre-enactment offenders, the only significant category of offenders likely to face sentencing on the 91st day after the FSA's enactment.

2. *The history of the crack/powder sentencing disparity supports the inference that Congress intended the FSA's statutory amendments to be immediately effective*

The court of appeals made no effort to reconcile its reasoning with Section 8 of the FSA. See Dorsey Pet. App. A2-A3 (acknowledging Congress's emergency directive to the Commission, yet concluding, without explanation, that Congress failed to "drop[] a hint" that it intended the FSA to "apply to not-yet-sentenced defendants convicted on pre-FSA conduct"). But in his opinion on the denial of rehearing en banc in *United States* v. *Holcomb*, 657 F.3d 445 (7th Cir. 2011), Chief Judge Easterbrook reasoned that, while Section 8 may have instructed the Commission to "get a move on in revising its Guidelines," that directive does not "imply anything about when the new [statutory] minimum and maximum sentences go into force." *Id.* at 450. That suggestion is irreconcilable not only with the FSA's textual directive to the Commission to conform the Guidelines to "applicable law," but also with the history of the crack/powder sentencing disparity, with which Congress was intimately familiar.

The crack/powder disparity was a "high profile area" that had previously occasioned Congress's only exercise of its power to disapprove a revision of the Guidelines. See *Kimbrough*, 552 U.S. at 106. Congress was well aware from that experience that Guidelines amendments alone would not achieve coherent reform of federal cocaine sentencing policy. In 1995, Congress indicated its disapproval of a piecemeal solution to the problems posed by the 100-to-1 ratio by rejecting the Commission's proposal to eliminate the 100-to-1 ratio from the Sentencing Guidelines. Congress took that step, in part, because of the "gross sentencing disparities" that would have resulted from such a change *without* simultaneously amending the statutory minimum penalties. H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995) (1995 House Report). Congress's primary reason for disapproving the 1995 amendment was its conclusion that a 1-to-1 ratio was too low. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334. But the House committee report also emphasized that, regardless of the correct ratio, it would make no sense for the Sentencing Commission to adopt a ratio under the Guidelines that was significantly out of proportion with the governing statutory minimum penalties: "[I]f the Commission's guideline amendments went into effect without

Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities." 1995 House Report 4; see also *id.* at 10 (explaining that the Commission's proposal would "drastically reduc[e]" Guidelines sentences "while the mandatory minimums would remain much higher," thereby "creat[ing] significant sentencing disparities for offenses involving minor quantity differences"). Congress accordingly rejected the Commission's proposal to amend only the Guidelines and instead directed the Commission to propose a "revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes *and* guidelines." § 2(a)(2), 109 Stat. 335 (emphasis added).

As Congress understood in enacting the FSA, absent a statutory directive to the contrary, the Commission would not be legally compelled to synchronize the Guidelines with the ratios in the mandatory minimum sentencing statutes. See *Kimbrough*, 552 U.S. at 102-105. The Commission could have adopted a different ratio in the Guidelines and still maintained technical consistency with the statutory minimum penalties by virtue of Guidelines § 5G1.1(b), which provides that, "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." But in directing the Sentencing Commission to implement the FSA on an emergency basis through "conforming amendments" calculated to "achieve consistency" with "applicable law," Congress could not have intended the Commission to recreate the same kind of "gross sentencing disparities" between the statutory penalties and the Guidelines that

Congress had decried in 1995.[8] See 1995 House Report 4.

To the contrary, Congress recognized that to repeal the 100-to-1 ratio in the statute without promptly amending the Guidelines would risk introducing needless incongruities into the law. The Sentencing Commission had emphasized exactly that point to Congress in its 2007 Report. After "unanimously and strongly urg[ing]" Congress to amend the statutory minimum penalties, 2007 Report 8, the Commission further requested that Congress include in any legislation implementing its recommendations "emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines." *Id.* at 9. Such authority, the Commission emphasized, "would enable the Commission to *minimize the lag between any statutory and guideline modifications* for cocaine offenders." *Ibid.* (emphasis added). Congress responded in Section 8 of the FSA not only by granting to the Commission the emergency authority it had requested, but by directing the Commission to exercise that authority "as soon as practicable."

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[8] The FSA thus creates a very different legal regime than the one that applied at the time of *Neal* v. *United States*, 516 U.S. 284 (1996). In that case, the Court held that the Sentencing Commission's adoption of a method for calculating drug weight in LSD cases different from the one Congress had adopted in the mandatory minimum sentencing statutes did not alter this Court's prior construction of the statutory methodology. *Id.* at 295-296. As the Court made clear in *Kimbrough*, this Court also "assumed" in *Neal* that the statute did not require the Commission "to adhere to the Act's method for determining LSD weights" within the Guidelines regime. *Kimbrough*, 552 U.S. at 104-105 & n.14. In the FSA, by contrast, Congress directed the Commission to "conform[ ]" the Guidelines to "applicable law"—the new FSA statutory thresholds. Particularly given that the Commission had consistently "keyed" the Guidelines ranges to the crack cocaine mandatory minimums, 552 U.S. at 100 n.10, and in light of the Commission's repeated pleas to Congress to lower the mandatory minimums so that the Commission could follow suit in the Guidelines, *e.g.*, 2007 Report 6-9, the FSA can only be interpreted as directing the Commission to follow the FSA's penalty structure in revising the Guidelines. The Commission's response to the FSA understood Section 8 in precisely that fashion. See pp. 36-38, *infra*; see also App., 44a-46a, *infra*.

Section 8's direction to the Commission to issue emergency Guidelines as soon as possible was thus intended to ensure that the revised drug quantity table would not needlessly lag *behind* the FSA's statutory changes. By changing the trigger quantities for the statutory minimum penalties in 21 U.S.C. 841(b), repealing the mandatory minimum sentence for simple possession in 21 U.S.C. 844(a), and then directing the Commission to issue "conforming amendments" to the Guidelines as soon as possible, Congress enabled the Commission to accomplish what the Commission had been unable to do 15 years earlier: purge the 100-to-1 ratio from the Sentencing Guidelines in a manner that "achieve[d] consistency with other guideline provisions and applicable law." 124 Stat. 2374.[9]

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[9] Failing to apply the FSA to all post-Act sentencings would produce another anomaly. Section 10 of the Act directs the Sentencing Commission, "[n]ot later than 5 years after the date of enactment of this Act," to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act." 124 Stat. 2375. But the offenders most likely to face sentencing in early years after the Act will be pre-enactment offenders, given the five-year limitations period for federal drug offenses and the time required to prosecute. See pp. 29-30 & n.7, *supra.* Thus, if the FSA's revised statutory penalties were inapplicable to pre-enactment offenders, then "during the time period in which the Sentencing Commission is supposed to produce a report on the effects

3. *Congress understood that the Commission could not effectively "achieve[] consistency" with "applicable law" if the pre-FSA mandatory minimums remained in effect*

Congress's instruction to the Commission in Section 8 to "achieve consistency" in implementing the FSA underscores the necessary inference that Congress intended all of the FSA's reforms, including the statutory amendments, to have immediate effect. As Congress well understood, the Commission could not meaningfully "achieve consistency" with "applicable law," § 8, 124 Stat. 2374, if the pre-FSA mandatory minimums remained "applicable" to pre-enactment offenders.

As Congress knew, the Commission has characteristically incorporated mandatory minimum penalties into the Sentencing Guidelines in a manner that ensures the consistency and proportionality of the sentences imposed for all drug quantities. Since the first version of the Guidelines, it has done so by using the threshold quantities for the mandatory minimum penalties imposed by Congress as "reference points" (1995 Report 126) and then "extrapolating upward and downward to set guideline sentencing ranges for all drug quantities" (2007 Report 3). See generally U.S. Sentencing

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of the FSA, the Act often [would] be inapplicable." *Dixon*, 648 F.3d at 202; see *ibid.* (suggesting that the required report "would be incomplete, at best, and incomprehensible, at worst" (citation omitted)); accord *Holcomb*, 657 F.3d at 457 (Williams, J., dissenting from denial of rehearing en banc). Congress's direction to the Commission to study "the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act" in the first "5 years after the date of enactment of this Act" naturally implies that Congress expected the FSA to have an "impact" immediately.

Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 53-55 (Oct. 2011) (2011 Mandatory Minimums Report). The Commission has employed this technique not only for crack and powder cocaine offenses, see 2007 Report 3; *Kimbrough*, 552 U.S. at 96-97, but for other mandatory minimum penalties in the federal drug laws as well, see, *e.g.*, 2011 Mandatory Minimums Report 53-54; 2007 Report 5. By incorporating statutory penalties into the Guidelines in this way, the Commission is able to establish a rational and consistent penalty scheme that, from the foundation established by Congress, assigns base offense levels to drug offenders in proportion to the quantity of drugs for which they are found responsible. See 2011 Mandatory Minimums Report 349 n.845 (explaining that "incorporating the mandatory minimum penalties in this manner" serves the purpose, *inter alia*, of ensuring "graduated, proportional increases based on drug quantity for the full range of possible drug types and quantities").

When Congress directed the Commission in Section 8 of the FSA to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law," 124 Stat. 2374, it signaled its intention for the Commission to incorporate the FSA's 18-to-1 ratio into the Guidelines in a similarly rational and proportional manner. And that is in fact how the Commission understood Section 8. In promulgating its emergency Guidelines amendments, the Commission explained that it would "account for the[] statutory changes" made by the FSA by "conform[ing] the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs"—*i.e.*, by using the FSA's revised statutory trigger quantities for the five- and ten-year mandatory minimum penalties (28 grams and 280 grams, respectively) as reference points and extrapolating upward and downward. 75 Fed. Reg. at 66,191 (App. *infra*, 44a-46a). The Commission explained: "[T]his approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table." *Ibid.*

But as Congress would have recognized, a "consisten[t] and proportional[]" scheme of this kind would be impossible for the Commission to achieve immediately if the pre-FSA mandatory minimums remained "applicable." Indeed, a Guidelines regime predicated on an 18-to-1 drug quantity ratio would be irreconcilably *inconsistent* with statutory minimum penalties based on a ratio more than five times as severe. The table below illustrates some of the gross incongruities that would result from sentencing pre-enactment offenders under the post-FSA Guidelines, see 18 U.S.C. 3553(a)(4), but also imposing the pre-FSA mandatory minimum penalties. See generally *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting from the denial of rehearing en banc) (providing similar examples). For example, an offender who possessed with the intent to distribute five grams of crack cocaine would face an advisory Guidelines sentence of 24 to 30 months of imprisonment under the post-FSA Guidelines amendments, assuming a criminal history category of II and no other aggravating or mitigating factors. See Guidelines § 2D1.1(c) (2011); *id.* Ch. 5, Pt. A (sentencing table). Under 21 U.S.C. 841(b)(1)(B) (2006), however, the district court would be required to impose a minimum sentence of 60 months—a sentence *two and one-half times* the minimum suggested by the Guidelines. And if the offender had a previous felony drug conviction, his post-FSA Guidelines range would still be 24 to 30 months, but his mandatory minimum penalty under pre-FSA law would be 120 months—up to *five times* the appropriate sentence indicated by the Guidelines.[10]

In light of Congress's directive to the Commission to make "conforming amendments * * * to achieve consistency" with "applicable law" in adopting new Guidelines that Congress knew would be immediately applicable to *all* offenders, 18 U.S.C. 3553(a)(4)(A)(ii),

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[10] These incongruities would be even worse for offenders with no criminal history, for whom the applicable Guidelines ranges are even lower. See Sentencing Guidelines Ch. 5, Pt. A (sentencing table). Under the "safety valve" provision in 18 U.S.C. 3553(f), however, drug-trafficking offenders who have little or no criminal history and who satisfy the other requirements of that provision—including "truthfully provid[ing] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan," 18 U.S.C. 3553(f)(5)—may be sentenced without regard to a statutory minimum penalty. See also Guidelines § 5C1.2. Offenders with a criminal history category of II or higher (*i.e.*, those with at least 2 criminal history points), however, are ineligible for relief under the safety valve. Relatively few crack offenders are eligible for safety-valve relief because most are disqualified by their criminal histories. See 2011 Mandatory Minimums Report 195 (only 11.7% of crack cocaine offenders received safety-valve relief in fiscal year 2010).

Crack Cocaine Quantity *(grams)*	**Criminal History Category**	**Post-FSA Guidelines Sentence *(months)***	**Pre-FSA Mandatory Minimum *(months)***	**Increase Over FSA Minimum Sentence**
5.0	II	24-30	60	150%
5.6	II	30-37	60	100%
11.2	II	37-46	60	62%
50.0	II	70-87	120	71%
112.0	II	87-108	120	38%
5.0 1 prior drug felony	II	24-30	120	400%
5.0 2 prior drug felonies	III	27-33	120	344%

Post-FSA Guidelines sentences and pre-FSA mandatory minimum penalties for selected crack cocaine quantities.

such results are contrary to Congress's manifest intent. The impossibility of a "consisten[t]" penalty scheme under the court of appeals' interpretation of the FSA is underscored by the fact that, for a wide variety of common drug quantities, the *entire Guidelines range* under the Commission's post-FSA Guidelines would be overridden by the pre-FSA mandatory minimum penalties.[11]

Mandatory minimum statutes play a critical role in crack cocaine sentencing. As this Court noted in *Kimbrough*, "[t]he Sentencing Commission reports that roughly 70 percent of crack offenders are responsible for drug quantities that yield base offense levels [under the pre-FSA Guidelines] at or only two levels above those that correspond to the statutory minimums." 552 U.S. at 108 n.15 (citing 2007 Report 25). And under pre-FSA law, most crack offenders remained subject to mandatory minimums at sentencing. See 2011 Mandatory Minimums Report 195 (in fiscal year 2010, 64% remained subject). For many of those defendants, the post-FSA Guidelines would be entirely irrelevant if the 100-to-1 statutory minimums remained applicable. Even offenders who qualified for sentences below the mandatory minimum under 18 U.S.C. 3353(e) by virtue of substantial assistance to the prosecution would not be assisted by the post-FSA Guidelines. Cf. 2011 Mandatory Minimums Report 196 (approximately 25% of crack offenders received substantial-assistance relief from statutory minimum penalties in fiscal year 2010). Substantial-assistance departures must be based solely on the level of the cooperation provided, not on an otherwise-applicable Guidelines range or *Booker* factors. See, *e.g.*, *United States* v. *Winebarger*, No. 11-1905, 2011 WL 6445136, at *7 (3d Cir. Dec. 23, 2011).

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[11] For example, under the FSA's 18-to-1 ratio, an offender with a criminal history category of II who was convicted of trafficking in 10 grams of crack cocaine would have a base offense level of 18 and an advisory Guidelines sentence of 30 to 37 months. See Guidelines § 2D1.1(c) (2011). But under pre-FSA law, the same offender would face a mandatory minimum penalty of 60 months, displacing his post-FSA Guidelines range entirely. See 21 U.S.C. 841(b)(1)(B) (2006). Even if that offender received a two- or even four-level enhancement for specific offense characteristics—for example, for possessing a firearm (Guidelines § 2D1.1(b)(1)) or maintaining a premises for distributing drugs (*id.* § 2D1.1(b)(12))—the applicable post-FSA Guidelines range would still be completely overridden by the pre-FSA mandatory penalty. A four-level increase would yield a base offense level of 22 and an advisory Guidelines range of 46 to 57 months, still less than the 60-month mandatory minimum penalty.

The post-FSA ranges that would be submerged below the pre-FSA mandatory minimum statutes encompass some of the most common crack cocaine quantities prosecuted in the federal courts. In fiscal year 2006, for example, the median drug weight for all crack cocaine offenders in the federal courts was 51.0 grams, and more than one-third of all offenders had less than 25 grams. See 2007 Report Tbl. 5-2, at 108, Tbl. 5-3, at 112. Given the significant influence of mandatory minimum statutes, as Judge Boudin observed, "[i]t seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums." *United States* v. *Douglas*, 644 F.3d 39, 444 (1st Cir. 2011); see also *Holcomb*, 657 F.3d at 457 (Williams, J. dissenting from the denial of rehearing en banc) ("Using a pre-FSA 100:1 minimum coupled with an 18:1 guideline to decide a sentence does not 'achieve consistency.' It achieves the opposite."); *United States* v. *Dixon*, 648 F.3d 195, 201 (3d Cir. 2011) ("Refusing to apply the mandatory minimums in the FSA eviscerates the very consistency and conformity that the statute requires.").

It is implausible that Congress directed the Commission to act "as soon as practicable" to issue amended crack cocaine Guidelines that would be wholly inapplicable to a substantial percentage of the crack cocaine offenders likely to face sentencing in the immediate wake of the FSA. Congress enacted the FSA against the backdrop of this Court's ruling in *Gall*, which recognized that "the Guidelines should be the starting point and the initial benchmark" for all sentencing decisions. 552 U.S. at 49. Congress could not have meant that district courts sentencing pre-enactment offenders must often start with a benchmark that would serve no purpose.

B. The History And Purposes Of The FSA Confirm That Congress Did Not Intend District Courts To Continue To Impose Mandatory Minimum Sentences Under A 100-to-1 Ratio

Congress's overriding aim in enacting the FSA was to correct a disproportionate and unjustified punishment regime that created racial disparities in sentencing and that had "foster[ed] disrespect for and lack of confidence in the criminal justice system." 2002 Report 103. In abolishing the 100-to-1 ratio, Congress commanded the Commission to act "as soon as practicable" to conform its Guidelines to the new mandatory minimum statutes, which embodied an 18-to-1 ratio. The history and purpose of the FSA remove any doubt that Congress sought to eradicate the 100-to-1 ratio from federal sentencing practice from the date of the Act forward.

1. The history of the FSA corroborates Congress's intent

Introduced in October 2009 as S. 1789 and reported out of the Senate Judiciary Committee by unanimous vote, the FSA passed the full Senate by unanimous consent and the House of Representatives by voice vote.

See 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin); *id.* at S1683; 156 Cong. Rec. H6204 (daily ed. July 28, 2010). Although no committee report acompanied the bill, the legislative history corroborates the clear implication of Section 8 of the FSA in at least two respects.

First, in drafting the FSA, Congress considered and rejected statutory language that would have expressly limited the application of the Act to offenses committed after the Act's effective date. The Senate bill that ultimately became the FSA, S. 1789, was based on an earlier measure, H.R. 265, 111th Cong. (2009) (H.R. 265), that had been introduced in the House in January 2009. Much of the original text of S. 1789 was drawn nearly verbatim from H.R. 265, including the provisions amending the crack/powder disparity, repealing the mandatory minimum penalty for simple possession of crack cocaine, and providing for various sentencing enhancements. Compare H.R. 265, §§ 3-5, 8-9 (as introduced Jan. 7, 2009), with S. 1789, 111th Cong. §§ 2-8 (as introduced Oct. 15, 2009); see also 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (describing H.R. 265 as "the underpinnings" of the FSA).[12] H.R. 265 further provided in its eighth section for a grant of "emergency authority" to the Sentencing Commission in language that closely parallels Section 8 of the FSA.

But H.R. 265 differed in two significant respects from the statute that Congress ultimately enacted. First, H.R. 265 provided, in a separate section entitled "Effective Date," that "[t]he amendments made by this

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[12] H.R. 265 would also have provided new federal grant programs to encourage drug treatment programs for prisoners. See H.R. 265, §§ 6-7. These provisions were not carried forward in S. 1789.

Act shall apply to any offense committed on or after 180 days after the date of enactment of this Act. There shall be no retroactive application of any portion of this Act." H.R. 265, § 11. The FSA contains no analogous provision. Second, while H.R. 265 would have provided emergency amendment authority to the Commission, it would have done so on a permissive rather than mandatory basis: the bill provided that the "Sentencing Commission, *in its discretion, may*" promulgate emergency amendments implementing "the directives in this Act." H.R. 265, § 8(a) (emphasis added). That permissive formulation was carried forward into the original version of S. 1789 introduced in the Senate. But Section 8 emerged from the legislative process as a mandatory directive to the Commission to implement the FSA's reforms "as soon as practicable." FSA § 8, 124 Stat. 2374.

Congress thus specifically considered and *deleted* language that would have confined the Act's effect to post-enactment conduct, implying that no such limitation was intended. See *Russello* v. *United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended."). And Congress underscored that it regarded implementation of the FSA's reforms as a priority by rejecting language that would merely have permitted, but not required, the Commission to act immediately.[13]

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[13] Although the Court declined to draw any inference from the permissive rather than mandatory authority granted to the Attorney General in *Reynolds* v. *United States*, No. 10-6549 (Jan. 23, 2012), slip op. 12, in the context of the FSA, the deliberate change from a permissive approach to a mandatory directive in the drafting history of

Second, the legislative history of the FSA makes clear that Congress was intensely concerned with the racially disparate impact of the crack/powder disparity. The Sentencing Commission reported in 2002 that "[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000." 2002 Report 102; see also 2007 Report 15 (approximately 82% of crack cocaine offenders in 2006 were black). Consequently, to the extent that the 100-to-1 ratio "result[ed] in unduly severe penalties for most crack cocaine offenders, the effects of that severity f[e]ll primarily upon black offenders." 2002 Report 103.

The unintended racial impact of the 100-to-1 ratio greatly disconcerted members of Congress. See, *e.g.*, 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) ("[T]he crack/powder disparity disproportionately affects African Americans."); *id.* at S10,492 (statement of Sen. Leahy) ("[T]his policy has had a significantly disparate impact on racial and ethnic minorities. * * * These statistics are startling. It is no wonder this policy has sparked a nationwide debate about race bias and undermined citizens' confidence in the justice system."); *id.* at S10,493 (statement of Sen. Specter) ("I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does."); 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) (reducing the crack/powder disparity "will do more than any other policy change to close the gap in incarceration rates between African Americans and white Americans"); *id.* at H6202 (statement of Rep.

Section 8 underscores Congress's intent that the amended Guidelines not lag behind the FSA's statutory amendments. See pp. 27-35, *supra*.

Lungren) ("When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes."). Congress cannot have intended to continue to impose statutory penalties based on a 100-to-1 ratio and thus perpetuate those racial disparities.

2. *The purpose of the FSA reinforces Congress's intent*

The court of appeals' interpretation of the FSA is also irreconcilable with the manifest purpose of the Act. Congress named the statute the "Fair Sentencing Act of 2010." § 1, 124 Stat. 2372. It explicitly stated that the purpose of the Act was to "restore fairness to Federal cocaine sentencing." Pmbl., 124 Stat. 2372. It enacted the statute in response to "almost universal criticism" (2007 Report 2) of the 100-to-1 disparity as disproportionately severe, unwarranted by any legitimate public policy, and racially disparate in impact. And the Sentencing Commission—the expert body that Congress had specifically created for the purpose, *inter alia*, of advising it on the need for statutory changes in sentencing law, see 28 U.S.C. 994(r)—had described the need to abolish the 100-to-1 ratio as both "urgent and compelling." 2007 Report 9.

Against that background, "what possible reason" could Congress have had "to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), aff'd, 644 F.3d 39 (1st Cir. 2011). None exists. Congress's judgment, based on the unanimous findings of the Sentencing Commission reiterated over more than 15 years, was that the statutory penalties reflecting the

100-to-1 ratio (as well as the mandatory minimum sentence for the simple possession of crack cocaine) were themselves a source of substantial unfairness in federal law. Prolonging the inequities of that scheme would serve no rational legislative purpose. Even the court of appeals could not identify any reason why Congress would have wanted offenders like petitioners to be sentenced "under a structure which has now been recognized as unfair" based only on a "temporal roll of the cosmic dice." Dorsey Pet. App. A4; see also *Holcomb*, 657 F.3d at 450 (Easterbrook, C.J.) (seeing "no satisfactory answer" to why Congress would have wanted pre-enactment offenders to remain subject to the prior mandatory minimums).

Chief Judge Easterbook thought it equally arbitrary to conclude that August 3, 2010, the date of the FSA's enactment, was the effective date: "[W]hat's fair about condemning someone sentenced on August 2 to more time in prison than a person sentenced the next day, even though they committed their crimes on the same date?" *Holcomb*, 657 F.3d at 451-452. But ordinary rules of finality counsel against the disruption caused by upsetting sentences already imposed and requiring full-scale resentencing. In many cases, the government may have declined to bring or agreed to drop other charges in reliance on the stringent mandatory minimum sentences for crack offenders. Reopening those sentences without permitting the government to revive other charges could create serious injustices, particularly if the statute of limitations or loss of evidence frustrated any such effort. Additionally, requiring full-scale resentencing under the FSA for previously sentenced defendants would impose substantial burdens on the administration of justice. Congress therefore had sound reason for leaving past sentencings undisturbed. But those concerns do not suggest that it intended to countenance the infliction of new unfairness in the future. See *Douglas*, 644 F.3d at 43-44 (noting that "the FSA's legislative history indicates Congress'[s] concern about any proposal that would require courts to resentence the vast number of prisoners in federal custody serving sentences for pre-FSA cocaine base offenses," but also observing that "new sentences being imposed today for pre-FSA cocaine base offenses are a far smaller category and present no such administrative burden").

Moreover, applying an ameliorative change to defendants sentenced after the new rule is issued, while withholding the new rule from defendants already sentenced, is the ordinary practice under the Sentencing Reform Act. The sentencing court applies the Guidelines and policy statements in effect on the date of sentencing, regardless of the date of the underlying conduct. See 18 U.S.C. 3553(a)(4)(A)(ii) and (5)(B). But the court cannot ordinarily modify a sentence of imprisonment already imposed.[14] 18 U.S.C. 3582(c).

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[14] Congress has authorized the Commission to make retroactively effective Guidelines amendments that reduce the recommended term of imprisonment. See 28 U.S.C. 994(u). But Congress has not required the Commission to do so. Thus, by instructing the Commission to issue emergency Guidelines implementing the FSA, Congress left to the Commission's discretion whether to make the amended Guidelines retroactive. In July 2011, the Commission voted to take that step, emphasizing that its decision would "not make any of the statutory changes in the [FSA] retroactive." See 76 Fed. Reg. 41,333 (July 13, 2011). Although that decision rendered many previously imposed sentences eligible for modification, see 18 U.S.C. 3582(c)(2), such proceedings are not full-fledged resentencings and consequently entail far fewer burdens on the criminal justice system. See *Dillon* v. *United*

Thus, defendants not yet sentenced may often benefit from new, more lenient Guidelines provisions while defendants who committed their crimes on the same dates, but who were charged or pleaded guilty earlier, may not. The "partial retroactivity" that Chief Judge Easterbrook regarded as incompatible with 1 U.S.C. 109, see 657 F.3d at 448, is in fact the general rule in federal sentencing law. And Congress adhered to that general rule in enacting the FSA.

C. The Court Of Appeals' Reliance On The General Saving Statute Was Misplaced

The court of appeals concluded that the general saving statute, 1 U.S.C. 109, foreclosed petitioners' requests to be sentenced under the FSA. See Dorsey Pet. App. A3-A4; Hill Pet. App. A2; see also *Holcomb*, 657 F.3d at 446-447 (Easterbrook, C.J.). Although the court of appeals was correct that the FSA is the sort of ameliorative criminal legislation that may trigger the default rule established by Section 109, that rule has no proper application here. Congress clearly expressed its intent that the FSA's revised statutory penalties should apply in all initial sentencing proceedings after the effective date of the Act, see pp. 27-43, *supra*, and it was the prerogative of Congress in 2010 "to make its will known in whatever fashion it deem[ed] appropriate." *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring). Because Congress expressed no such intent with regard to offenders who had already

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States, 130 S. Ct. 2683, 2691 (2010) (Section 3582(c)(2) authorizes "only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding"); see also 76 Fed. Reg. at 41,334 (observing that Section 3582(c)(2) motions are "routinely" decided "on the filings, without the need for a hearing or the presence of the defendant").

been sentenced under prior law, however, Section 109 preserves the final judgments imposed in such cases, consistent with the framework established by Congress in the Sentencing Reform Act.

1. Section 109 provides a default rule that is overcome by a clear contrary legislative intent

At common law, the repeal or amendment of a criminal statute—including an amendment that reduced the applicable penalties—abated all prosecutions under the repealed statute that had not yet become final on appeal. *Marrero*, 417 U.S. at 660; *Bradley* v. *United States*, 410 U.S. 605, 607-608 (1973); see, *e.g.*, *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871) (replacement of 1813 criminal statute by a broader criminal statute with different penalties abated pending prosecution). To avoid inadvertent abatements under that doctrine, Congress in 1871 enacted the general federal saving statute, which in its current form provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. 109; see Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432; *Marrero*, 417 U.S. at 660.

Section 109 thus presumptively reverses the common law rule: federal criminal liability incurred when a person commits an offense is presumed *not* to be released or extinguished by the modification or repeal of the law proscribing his conduct or providing the penalty. See *Marrero*, 417 U.S. at 659-664 (Section 109 preserved a prohibition against parole under repealed statute); *United States* v. *Reisinger*, 128 U.S. 398, 403 (1888) ("[The] word 'liability' [in the saving statute] is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country." (quoting *United States* v. *Ulrici*, 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594) (Miller, Circuit Justice)).

But Section 109 establishes only a default rule. Because "one legislature cannot abridge the powers of a succeeding legislature," *Fletcher*, 10 U.S. (6 Cranch) at 135, this Court has recognized "that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute." *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). "When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Id.* at 149. See, *e.g.*, *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955) (concluding that the Immigration and Nationality Act exempted deportation hearings from the procedural requirements of the APA, notwithstanding the APA's express-reference requirement).

For this reason, notwithstanding that Section 109 on its face preserves liability for acts done under repealed statutes unless the repealing act "expressly provide[s]" otherwise, this Court has explained that Section 109 has no effect if a subsequent Act of Congress clearly expresses—in any sufficient fashion—a contrary intent. See, *e.g.*, *Great N. Ry.*, 208 U.S. at 465 (Section 109 "cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment."); *id.* at 466 ("by fair implication"); *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910) ("by clear implication"); *Marrero*, 417 U.S. at 659 n.10 ("by fair implication").

2. *Congress clearly expressed its intent that the FSA's revised penalties should apply immediately in post-enactment sentencings.*

Section 109 therefore does not prevent a sentencing court from applying the FSA's revised statutory penalties to pre-enactment offenders, such as petitioners, who had not yet been sentenced on the date of enactment. As explained, pp. 27-43, *supra,* Congress clearly expressed its intent that its repeal of the 100-to-1 ratio should be immediately effective. Section 8's emergency directive to the Sentencing Commission is incompatible with the court of appeals' conclusion that Congress intended district courts to continue to impose mandatory minimum sentences under pre-FSA law for years into the future. It was Congress's prerogative in enacting the Fair Sentencing Act to "to make its will known in whatever fashion it deem[ed] appropriate." *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). That intent controls under Section 109 and was binding on the courts below.

At the same time, Section 109 requires the conclusion that pre-enactment offenders on whom a sentence had *already* been imposed at the time of the FSA's enactment remain ineligible for relief from the mandatory statutory penalties imposed under prior law. See *Marrero*, 417 U.S. at 659-664 (Section 109 barred habeas corpus relief for an offender convicted and sentenced under a prior scheme). Nothing in the FSA expresses a clear congressional intent with regard to such offenders: by directing the Commission to issue "as soon as practicable" Guidelines amendments that would apply in all initial sentencing proceedings, 18 U.S.C. 3553(a)(4), Congress addressed itself to future sentencing determinations, not to determinations already made and embodied in final judgments. Consequently, as every court of appeals to address the question has held, see *United States* v. *Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (per curiam) (collecting cases), Section 109 bars offenders who were both convicted and sentenced before the enactment of the FSA from obtaining relief under the Act, except to the limited extent that Congress has otherwise provided for retroactive sentence adjustments under the Sentencing Reform Act. 1 U.S.C. 109; see 18 U.S.C. 3582(c).[15]

Congress thus adhered in the Fair Sentencing Act to the basic framework for federal sentencing determinations established decades earlier in the Sentencing Reform Act. As already discussed, see pp. 49-50, *supra*, that Act contemplates that a sentencing court cannot ordinarily modify a sentence of imprisonment already imposed. 18 U.S.C. 3582(c). But it also contemplates a system of ongoing refinement in which sentencing courts must consider the suitable penalty for an offense as reflected in the most recent Guidelines and policy statements promulgated by the Sentencing Commission. 18 U.S.C. 3553(a)(4) and (5); see, *e.g.*, 28 U.S.C. 991(b)(1)(C) (directing that the Guidelines and policy statements shall "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process"); 28 U.S.C. 994(f); 28 U.S.C. 994(*o*) ("The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the [Guidelines]."). Thus, the Senate committee report accompanying the Sentencing Reform Act explained that Section 3553(a)(4) reflected the "philosophy embodied in" the Act that the operative version of the Guidelines should always reflect the "most sophisticated" understanding of the penalties that "will most appropriately carry out the purposes of sentencing." S. Rep. No. 223, 98th Cong., 1st Sess. 74 (1983); see also *ibid.* ("To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.").

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[15] As previously noted, see note 14, *supra*, the Sentencing Commission in July 2011 exercised its discretion under 28 U.S.C. 994(u) to make its post-FSA Guidelines amendments retroactively effective.

Consistent with that longstanding approach to federal sentencing law, Congress did not seek in the Fair Sentencing Act to disturb mandatory minimum sentences imposed before the FSA's enactment. But it *did* intend that crack cocaine offenders such as petitioners who had not yet been sentenced when the FSA became effective would receive a sentence according to the FSA's terms, which reflect Congress's best judgment regarding the penalty appropriate for their crimes.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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JANUARY 2012

APPENDIX A

[SEAL OMITTED]

Office of the Attorney General
Washington, D.C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr. ERIC J. HOLDER, JR.
Attorney General

SUBJECT: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States* v. *Douglas*, No. 10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to "restore fairness in federal cocaine sentencing policy" but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act's central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law. That is what I direct you to undertake today.

APPENDIX B

1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 provides:

An Act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Sentencing Act of 2010".

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended—

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

(b) IMPORT AND EXPORT ACT.—Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, DR DISPENSE.—Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended—

(1) in subparagraph (A), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in subparagraph (B), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION.— Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended—

(1) in paragraph (1), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting" $10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in paragraph (2), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if—

(1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;

(2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U.S.C. 856); or

(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant—

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction.

(ii) The defendant—

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that—

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant—

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall—

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797–u et seq.).

(b) CONTENTS.—The report submitted under subsection (a) shall—

(1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;

(2) address the effect of drug courts on recidivism and substance abuse rates;

(3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;

(4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and

(5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

Approved August 3, 2010.

2. 21 U.S.C. 841(a) provides:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

3. 21 U.S.C. 841(b) (2006 & Supp. IV 2010) provides:

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl- N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2- phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of Nphenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised re-

lease of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

4. 21 U.S.C. 841(b) (2006 & Supp. III 2009) provides:

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of-

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2- phenylethyl) -4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)- 4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an indi-

vidual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

5. 21 U.S.C. 844(a) (Supp. IV 2010) provides:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

6. 21 U.S.C. 844(a) (2006) provides:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

7. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

8. Pub. L. No. 104-38, 109 Stat. 334 (1995) provides:

An Act

To disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences and sentences for money laundering and transactions in property derived from unlawful activity.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

---

[1] So in original. The period probably should be a semicolon.

SECTION 1. DISAPPROVAL OF AMENDMENTS RELATING TO LOWERING OF CRACK SENTENCES AND SENTENCES FOR MONEY LAUNDERING AND TRANSACTIONS IN PROPERTY DERIVED FROM UNLAWFUL ACTIVITY.

In accordance with section 994(p) of title 28, United States Code, amendments numbered 5 and 18 of the "Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary", submitted by the United States Sentencing Commission to Congress on May 1, 1995, are hereby disapproved and shall not take effect.

SEC. 2. REDUCTION OF SENTENCING DISPARITY.

(a) RECOMMENDATIONS.—

(1) IN GENERAL.—The United States Sentencing Commission shall submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses, and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations—

(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine;

(B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection—

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon;

(iii) uses or possesses a firearm;

(iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities;

(vi) knows, or should know, that he is involving an unusually vulnerable person;

(vii) restrains a victim;

(viii) traffics in cocaine within 500 feet of a school;

(ix) obstructs justice;

(x) has a significant prior criminal record; or

(xi) is an organizer or leader of drug trafficking activities involving five or more persons.

(2) RATIO.—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code.

(b) STUDY.—No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute. The Sentencing Commission shall submit to the Judiciary Committees comments on the study prepared by the Department of Justice.

Approved Oct. 30, 1995.

9. 75 Fed. Reg. 66,188 (2010) provides in pertinent part:

UNITED STATES SENTENCING COMMISSION

Sentencing Guidelines for United States Courts

* * * * *

Notice of a temporary, emergency amendment to sentencing guidelines and commentary.

SUMMARY: Pursuant to section 8 of the Fair Sentencing Act of 2010, Public Law 111-220, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

* * * * *

[66,190]

* * * * *

Reason for Amendment: This amendment implements the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111-220 (the "Act"). The Act reduced the statutory penalties for cocaine base ("crack cocaine") offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives requiring the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act.

First, the amendment amends the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. *See* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, *i.e.*, the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. *See generally* § 2D1.1, comment. (backg'd.). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are established by extrapolating upward and downward. Conforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.

* * * * *

10. Section 21 of Pub. L. No. 100-182 provided that:

EMERGENCY GUIDELINES PROMULGATION AUTHORITY.

(a) IN GENERAL.—In the case of—

(1) an invalidated sentencing guideline;

(2) the creation of a new offense or amendment of an existing offense; or

(3) any other reason relating to the application of a previously established sentencing guideline, and determined by the United States Sentencing Commission to be urgent and compelling;

the Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of title 28 and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress under section 994(p) of title 28, United States Code.

(b) EXPIRATION OF AUTHORITY.—The authority of the Commission under paragraphs (1) and (2) of subsection (a) shall expire on November 1, 1989. The authority of the Commission to promulgate and distribute guidelines under paragraph (3) of subsection (a) shall expire on May 1, 1988.

10. Sentencing Guidelines 2D1.1(c) (2009) for cocaine base provides:

DRUG QUANTITY TABLE

Controlled Substances and Quantity*	**Base Offense Level**
(1) 4.5 KG or more of Cocaine Base	Level 38
(2) At least 1.5 KG but less than 4.5 KG of Cocaine Base	Level 36
(3) At least 500 G but less than 1.5 KG of Cocaine Base	Level 34
(4) At least 150 G but less than 500 G of Cocaine Base	Level 32
(5) At least 50 G but less than 150 G of Cocaine Base	Level 30
(6) At least 35 G but less than 50 G of Cocaine Base	Level 28
(7) At least 20 G but less than 35 G of Cocaine Base	Level 26
(8) At least 5 G but less than 20 G of Cocaine Base	Level 24
(9) At least 4 G but less than 5 G of Cocaine Base	Level 22

(10) At least 3 G but less than 7 G of Cocaine Base	Level 20
(11) At least 2 G but less than 3 G of Cocaine Base	Level 18
(12) At least 1 G but less than 2 G of Cocaine Base	Level 16
(13) At least 500 MG but less than 1 G of Cocaine Base	Level 14
(14) Less than 500 MG of Cocaine Base	Level 12

* * * * *

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

11. Sentencing Guidelines 2D1.1(c) (Suppl. 2010) for cocaine base provides:

DRUG QUANTITY TABLE

Controlled Substances and Quantity*	**Base Offense Level**
(1) 8.4 KG or more of Cocaine Base	Level 38
(2) At least 2.8 KG but less than 8.4 KG of Cocaine Base	Level 36

(3)	At least 840 G but less than 2.8 KG of Cocaine Base	Level 34
(4)	At least 280 G but less than 840 G of Cocaine Base	Level 32
(5)	At least 196 G but less than 280 G of Cocaine Base	Level 30
(6)	At least 112 G but less than 196 G of Cocaine Base	Level 28
(7)	At least 28 G but less than 112 G of Cocaine Base	Level 26
(8)	At least 22.4 G but less than 28 G of Cocaine Base	Level 24
(9)	At least 16.8 G but less than 22.4 G of Cocaine Base	Level 22
(10)	At least 11.2 G but less than 16.8 G of Cocaine Base	Level 20
(11)	At least 5.6 G but less than 11.2 G of Cocaine Base	Level 18
(12)	At least 2.8 G but less than 5.6 G of Cocaine Base	Level 16
(13)	At least 1.4 G but less than 2.8 G of Cocaine Base	Level 14
(14)	Less than 1.4 G of Cocaine Base	Level 12

* * * * *

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

* * * * *

REPLY
BRIEF

No. 11-5721

IN THE

Supreme Court of the United States

◆

CoREY A. HILL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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TABLE OF CONTENTS

PAGE

PRELIMINARY STATEMENT 1

I. SECTION 109 DOES NOTHING TO DISTURB THE FSA'S IMMEDIATE APPLICATION 4

II. SECTIONS 8 AND 10 OF THE FSA FAIRLY IMPLY THAT CONGRESS INTENDED THE FSA'S AMELIORATIVE PROVISIONS TO APPLY RETROACTIVELY.......... 8

  A. The Only Reasonable Interpretation Of Section § 8 Fairly Implies Retroactive Application............. 8

  B. Section 10 Fairly Implies That Congress Intended The FSA To Be Retroactive.................... 16

  C. The Legislative History And The Stated Purpose Of The FSA Provide Meaningful Support For The Implication Of Retroactivity 18

CONCLUSION................................ 20

TABLE OF AUTHORITIES

Cases PAGE

Dean v. United States,
556 U.S. 568 (2009) 12

Fletcher v. Peck,
10 U.S. (6 Cranch) 87 (1810) 5

Great N. Ry. Co. v. United States,
208 U.S. 452 (1908) 4, 5, 7

Hertz v. Woodman,
218 U.S. 205 (1910) 7

Lockhart v. United States,
546 U.S. 142 (2005) 5, 7

Marcello v. Bonds,
349 U.S. 302 (1955) 5, 6, 18, 19

McNeill v. United States,
131 S. Ct. 2218 (2011) 14, 15, 16

Russello v. United States,
464 U.S. 16 (1983) 18

Warden, Lewisburg Penitentiary v. Marrero,
417 U.S. 653 (1974) 4

Statutes

1 U.S.C. § 109 ....1, 4, 5, 6, 7, 18

18 U.S.C. § 3553(a)(4)(ii) 15

18 U.S.C. § 3553(f)........................ 13

28 U.S.C. §§ 994(o) and (p) 10

PAGE

Fair Sentencing Act of 2010,
Pub. L. No. 111-220,
124 Stat. 2372 (2010) .... *passim*

Rules

Fed. R. Crim. P. 32 12

Sentencing Guidelines

U.S.S.G. App. C, Amend. 748
(effective Nov. 1, 2011) 10

U.S.S.G. App. C, Amend. 750
(effective Nov. 1, 2011) 11

U.S.S.G. App. C, Amend. 759
(effective Nov. 1, 2011) 11

Legislative Materials

H.R. 265 § 11, 111th Cong. (2009) 18

H.R. 4545 § 11, 110th Cong. (2007) 18

S. 1383 § 204(b), 110th Cong. (2007)........ 18

S. 1711 § 11, 110th Cong. (2007) 18

S. Rep. No. 225, 98th Cong.,
1st Sess. (1983) 15

PRELIMINARY STATEMENT

In the FSA's statutory text, its legislative history, and its stated purpose, Congress fairly implied that the statute's ameliorative sentencing provisions apply immediately to all post-enactment sentencings. The Court-appointed amicus curiae (hereinafter "Amicus") claims that more was required before the FSA could take immediate effect. Amicus invents a new, more "stringent standard" that would require Congress, in addition to signaling that the FSA was to take effect immediately, to "repeal" § 109. (Am. Br. 18). This repeal, Amicus argues, could only be accomplished by creating an "irreconcilable conflict" between § 109 and the FSA such that the two statutes could not reasonably co-exist. (*Id.*).

Amicus's approach is contrary to over two centuries of this Court's precedent. Congress was not required to repeal § 109 before the FSA could operate immediately, because Congress was not inexorably bound by § 109. Section 109 is a background rule of statutory construction that does not straightjacket Congress and must give way when Congress so signals. To any extent that Congress was required to address § 109 in enacting the FSA, it was able to do so without the necessity of creating an "irreconcilable conflict" with the FSA. Congress could—and did—displace § 109 by fairly implying that it intended the FSA to apply immediately, and it was not required to do anything further to achieve this end.

Congress's fair implication is apparent from the text of Sections 8 and 10 of the FSA. Section 8 of the FSA contains an urgent directive to the

Sentencing Commission to make "conforming amendments" to the Guidelines as soon as possible to "achieve consistency" with other Guidelines provisions and "applicable law." The phrase "applicable law" in this context necessarily includes the FSA itself, as there was a clear time-sensitive need to conform the Guidelines with the FSA so that the Guidelines' recommended sentences would be consistent with the FSA's new mandatory minimum sentences. Interpreting "applicable law" to include the FSA is consistent with the statute's text, its stated purpose, and its legislative history, all of which suggest that Congress believed it imperative to decrease the disparity between crack and cocaine sentences.

Section 10 of the FSA, which requires the Commission to study and submit to Congress within five years of enactment a report regarding the impact of the changes in federal sentencing under the FSA, provides further evidence of Congress's intent to apply the statute immediately. From this provision, it is fair and reasonable to imply that Congress intended the ameliorated mandatory minimum sentences resulting from the amendments to the Controlled Substances Act made in § 2 of the FSA to apply to all post-enactment sentencings so that meaningful and useful data might be compiled for the Commission's mandated study and report.

Amicus's arguments to the contrary offer strained interpretations of Sections 8 and 10 of the FSA that require either reading out terms from the statute, or reading them to mean something highly implausible. Under Amicus's approach, Congress in § 8 directed the

Commission to issue "conforming" amendments on an "emergency" basis, because it wanted the new Guidelines to match the new mandatory minimums for defendants who committed their offense conduct after the FSA's enactment. However, by directing the Commission to act as soon as possible and within no later than 90 days, Congress demonstrated that it was not concerned with post-enactment offenders, whose sentencings would be unlikely to occur so rapidly as to warrant the extraordinary speed required of the Commission. Rather, Congress was addressing the need to extend the FSA retroactively to pre-enactment offenders whose sentences, which were then occurring on a daily basis, otherwise would lack the consistency and conformity mandated by the FSA.

In addition, Amicus contends that the Commission's report to Congress under FSA § 10 was intended only to study how the FSA affected an offender's decision to sell crack. (Am. Br. 46). But it is clear from the FSA's text that Congress intended to assess whether the new law had accomplished its goal of fairer sentencing, given the directive to the Commission to study the "impact of the *changes in Federal sentencing law* under this Act." FSA § 10, 124 Stat. at 2375 (emphasis added). Amicus's arguments do nothing to rebut the fair implication, drawn from the FSA's text and corroborated by its purpose and legislative history, that Congress intended it to operate immediately.

I. SECTION 109 DOES NOTHING TO DISTURB THE FSA'S IMMEDIATE APPLICATION.

This Court has long held that Congress may demonstrate its intent to displace § 109 in a statute that repeals a prior penalty either expressly, or by fair or necessary implication. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974) (observing that a repealing statute will displace 109 "if [the repealing statute] can be said by fair implication or expressly to conflict with § 109"); *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (explaining that § 109 "cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment"). Under these precedents, all Congress need do to displace § 109 is to imply that it wants the later statute to apply retroactively.

Amicus, however, ignores this longstanding rule and devises a new and "intentionally high[er]" standard that Congress must meet before the FSA can displace § 109's default rule. (Am. Br. 18). According to Amicus, to conclude that § 109 has been superseded, the Court must find an "irreconcilable conflict" between the two statutes so strong that the latter statute constitutes a repeal of the former. (Am. Br. 18). He also suggests that to displace § 109, Congress must do so "expressly." (Am. Br. 17).

Nothing in this Court's jurisprudence imposes such a strict requirement. For over 100 years, this Court has held that only a fair implication is required to displace § 109; and it has never characterized the displacing statute as a "repeal" of § 109. Amicus studiously avoids citing these holdings because they do not support his argument.

Indeed, this Court has emphasized that there are no "magical passwords" whatsoever that Congress must use to escape the bind of an earlier statute such as § 109. *Marcello v. Bonds*, 349 U.S. 302, 310 (1955); *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("We have made clear in other cases as well, that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute."); *Great N. Ry.*, 208 U.S. at 465 (stating that § 109 does not control over a repealing statute when "it results that the legislative mind will be set at naught by giving effect to the provisions of § [109]"). The reason for this principle stems from the axiom that "one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). Congress's legislative power thus includes its ability to alter legislative acts by contradicting them in any way it deems appropriate, whether implicitly or otherwise. *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). Requiring Congress to repeal § 109 every time that it seeks to apply a new penalty would impair Congress's Constitutional power to legislate.

Were there any doubt on this point, the Court's holding in *Marcello v. Bonds*, 349 U.S. 302 (1955), demonstrates the error in Amicus's approach. In *Marcello*, this Court looked no further than a fair implication from Congress to find that a new enactment was intended to displace a prior default saving rule. The Court held that the Immigration and Nationality Act ("INA") had displaced the Administrative Procedure Act's ("APA") procedural requirements in deportation hearings, despite a saving clause in the APA that preserved such procedures and provided (akin to § 109) that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so *expressly*." *Marcello*, 349 U.S. at 317 (emphasis added) (internal quotation marks omitted). *Marcello* held that based on Congress's adaptation of the APA to the deportation process, the INA's legislative history, and its direction that the new procedures be the only procedures used at deportation hearings, Congress intended to exempt deportation proceedings from the default saving rule. *Id.* Thus, *Marcello* established no requirement that the INA "expressly" displace the APA, notwithstanding the language of the APA's saving clause to that effect.

In any event, Amicus's reliance on the concept of a later statute "repealing" § 109 must be incorrect, because Petitioner is not seeking to eliminate § 109 altogether. If Congress were required to "repeal" § 109, it would render that statute a dead letter. To rely on § 109 in the future, as Congress may well desire to do, Congress would be forced to resurrect it by a specific re-enactment. Obviously, no one believes that is the central issue of this case. Petitioner seeks only a one-time exemption from § 109, which would require a finding that the FSA fairly implies that he benefits from its ameliorative provisions.

Finally, Amicus takes much too literally the idea that § 109 should be treated as if it were automatically engrafted onto the FSA. (Am. Br. 17) (citing *Great N. Ry.*). Were that concept true, it would elevate § 109 to the status of a binding mandate that could not be overridden save by special legislative efforts—an approach rejected in *Great N. Ry.* itself, when this Court authorized an "implication" as an alternative to an "express" statement to displace § 109. 208 U.S. at 465. With each new enactment, Congress would be required not only to repeal an old penalty and signal that the new penalty is in effect immediately, but also make known its intent to repeal § 109; and in the absence of such special efforts, Congress would be bound by prior legislation, no matter how plain the implication that the old penalty is null and void immediately.

In fact, however, § 109 is only a background rule of statutory construction, which should be read to give effect to the intent of Congress. *Hertz v. Woodman*, 218 U.S. 205, 217 (1910); *see Lockhart*, 546 U.S. at 148 (Scalia, J., concurring) ("To be sure, legislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware."). Section 109 controls if and when Congress does not indicate to the contrary. Section 109 does not require Congress to take the extra step of a repeal any time it wants new legislation to operate immediately.

II. SECTIONS 8 AND 10 OF THE FSA FAIRLY IMPLY THAT CONGRESS INTENDED THE FSA'S AMELIORATIVE PROVISIONS TO APPLY RETROACTIVELY.

The fair implication drawn from the text of Sections 8 and 10 of the FSA is that Congress intended its ameliorative provisions to apply immediately, in all non-final cases, regardless of when the underlying crime was committed. That implication is consistent with and supported by the FSA's legislative history—in particular, the deletion in the final version of the bill of an anti-retroactivity provision that appeared in four prior versions of the bill. It also coheres with the stated purpose of the FSA—to restore fairness to federal cocaine sentencing—from which only one reasonable inference may be drawn as to the intent of Congress with respect to retroactivity.

A. The Only Reasonable Interpretation Of § 8 Implies Retroactive Application.

The text of § 8 of the FSA plainly and fairly supports the implication that Congress intended the FSA's ameliorative provisions to apply retroactively. The FSA directed the Commission to issue "as soon as practicable, and in any event not later than 90 days" Guidelines that would "conform" to and be "consistent" with the law, including the new mandatory minimums. FSA § 8, 124 Stat. at 2374. The clear implication of the statutory language is that the new mandatory minimums would take effect rapidly so that the Guidelines would have a model against which to conform and be consistent. The Commission fulfilled its obligation and issued amended Guidelines that took effect on November 1, 2010, which implemented those minimums. Congress thereafter did nothing to suggest that the Commission misunderstood its proper mandate.

The Congressional directive to the Commission to make "conforming amendments" to the Guidelines was for one express purpose—to "achieve consistency" with other Guidelines provisions and "applicable law." FSA 8, 124 Stat. at 2374. Here, "applicable law" plainly encompasses the FSA itself, including its revised mandatory minimums for crack offenders. These three statutory phrases—"conforming amendments," "applicable law," and "achieve consistency"—compel the conclusion that Congress intended the new mandatory minimums to be effective immediately.

Amicus contends that while it is "certainly possible" to read § 8's reference to "applicable law" as including other provisions of the FSA itself, the support for that interpretation is "vastly overstate[d]." (Am. Br. 40). According to Amicus, the text of § 8(2) indicates that the only "conforming amendments" Congress authorized were those made to *existing* guidelines that were necessary to achieve consistency with any *new* Guidelines promulgated under § 8(1). (*Id.*). Amicus believes that the latter category includes only Guidelines provided for in § 5 (Guideline enhancements for acts of violence), § 6 (Guidelines reflecting aggravating factors), and § 7 (Guidelines reflecting mitigating factors), and nothing further. (*Id.*). Notably, he contends that § 2 (the mandatory minimum reduction) does not authorize new Guidelines at all. (*Id.*). Furthermore, he agrees that the term "applicable law" refers to "those pre-existing legal rules that otherwise apply to the Sentencing Commission specifically or to administrative action generally," such as the statutory provisions governing the process for submission and publication of proposed Guideline amendments and the effective date of those amendments. (Am. Br. 40-41 n.9 (citing 28 U.S.C. §§ 994(o)-(p)).

That position is insupportable. To begin with, Amicus's rendering of "applicable law" makes a hash out of the language of § 8. It is difficult to understand why "conforming amendments" to the Guidelines would be needed to "achieve consistency" with the administrative rules that govern the Commission's operations. Moreover, since by its very terms § 8(2) invokes the use of emergency authority so the Commission can promulgate conforming amendments as soon as possible, it would be inexplicable for Congress to mandate consistency with the very statutory provisions that such emergency authority was intended to bypass. That interpretation simply makes no sense.

Amicus's position is wrong for a deeper reason as well. According to Amicus, nothing in § 8 authorized the Commission to issue new crack Guidelines implementing an 18-to-1 ratio. Such amendments were not necessary to achieve consistency with any of the Guidelines expressly authorized elsewhere in the FSA (namely, in §§ 5-7), nor were they needed to conform to "applicable law." But the Commission *did* promulgate those Guidelines on November 1, 2010, acting on the belief that its action was mandated by § 8. U.S.S.G. App. C, Amend. 748 ("Reason for Amendment") (Nov. 1, 2010). According to

Amicus's logic, not only was the Commission wrong, but the promulgation of those Guidelines was an *ultra vires* act, since the Commission had no emergency authority to implement the 18-to-1 ratio, and should have been required to follow its normal amendment cycle, which (as Amicus himself notes) requires no less than 180 days. Taking Amicus's claim seriously would lead to the unlikely conclusion that every offender sentenced after the FSA's enactment but before November 1, 2010 was sentenced under invalid Guidelines that were without any force or effect.

There is not the slightest support for the notion that the Commission made such a glaring and fundamental error. No court has held that way, even among those that concluded the FSA was not retroactive. More important, if the Commission had so radically misconstrued its mandate under the FSA, surely many Members of Congress—which, according to Amicus, was able to muster a majority to pass the law only because it compromised against retroactivity—would have quickly expressed their strong disapproval. But there was no reaction of the kind. Congress said nothing at the time, nor when the Commission made those amendments permanent a year later, U.S.S.G. App. C, Amend. 750 (Nov. 1, 2011), and then also determined that they should have full retroactive effect for all eligible individuals previously sentenced for a crack-cocaine offense. *Id.*, Amend. 759. Congress never expressed its disapproval, because it knew that the Commission had implemented its task exactly as the FSA required.[1]

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[1] Even assuming that the interpretations given to § 8 by Amicus and Petitioner were equally reasonable, the rule

Amicus's core challenge to the inference of retroactivity implicit in § 8 is based on his speculation that Congress enacted that emergency provision solely to ensure that post-enactment crack offenders would receive the benefit of reduced Guidelines. (Am. Br. 41-43). But that argument does not account for the extreme emphasis that Congress placed on haste in implementing the new 18-to-1 ratio. Congress did not merely order the Commission to act more quickly than its normal 180-day cycle. It insisted that "conforming amendments" be promulgated "as soon as practicable," and no later than 90 days after enactment. As demonstrated in Petitioner's opening brief, 90 days (which, again, was the *maximum* period allowed for administrative action) is among the shortest periods ever specified in a grant of emergency authority to the Commission. (Hill Opening Br. 18-19 & n.5).

It is simply not plausible that Congress was worried about the possibility of a defendant who would commit a crack offense on August 4, 2010, and be apprehended, indicted, convicted, and sentenced—all within as quickly as 90 days. To be sure, one can always manufacture a thought experiment with unrealistic facts, but the reality is that the criminal process virtually never moves that quickly.[2] It is far more likely that Congress

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of lenity counsels that the better interpretation is the one that errs on the side of leniency. *Dean v. United States*, 556 U.S. 568 (2009) (Breyer, J., dissenting).

[2] For example, a defendant is entitled to a 35-day period in which to review a draft Presentence Report and raise objections before sentencing. Fed. R. Crim. P. 32. That period alone would account for over a third of the 90 days that Amicus posits could cover the entire span from the commission of a crime to

ordered the Commission to act "as soon as practicable" because it predicted correctly that there would be pre-enactment offenders whose sentencing dates would occur immediately after passage of the law, and Congress wanted them to have the benefit of lower Guidelines (and mandatory minimums) as soon as possible.[3]

The safety-valve provisions of 18 U.S.C. § 3553(f)—which allow courts to ignore mandatory minimums in certain types of drug cases—are a red herring and prove nothing either way about the retroactivity of the FSA. (Am. Br. 44). Amicus seems to think that because those provisions were supposedly the "traditional tool" for ameliorating overly severe mandatory minimum sentences, there was no need for the FSA to have retroactive effect. But obviously the safety valve did not cover every defendant that Congress thought had been subject to unfair crack penalties, or else it would not have needed to pass the disparity reduction contained in § 2 of the FSA in the first place. Indeed, against the backdrop of the safety-valve

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sentencing. Significant delays, however, occur just between the commission of a crime and the arrest. Petitioner Hill, for example, was arrested *15 months* after he committed his offense. The abbreviated timeline urged by Amicus is demonstrably implausible.

[3] Flipping his own argument on its head, Amicus contends that the 90-day period was too *long*, and actually shows that Congress was "willing[] to live" with the old Guidelines even in the aftermath of the FSA. (Am. Br. 43 n.10). Of course, that argument conveniently ignores the language of the mandate that the Commission must act "as soon as practicable." FSA § 8(1), 124 Stat. at 2374. It also assumes, without any apparent basis, that the Commission should have been able to implement the entire package of changes contained in the FSA in less than 90 days.

provisions, the underlying purpose of the FSA comes into sharper focus. That the FSA's sweep was not limited to those who would traditionally be thought deserving of "leniency" (Am. Br. 44) only highlights the fact that Congress felt that crack sentences were ultimately *unfair* across the board.[4]

The fair and reasonable implication of retroactivity drawn from § 8 is not undermined by § 4 of the FSA, which increased penalties for certain offenses, as argued by Amicus. (Am. Br. 37-38). Congress plainly understood that the Constitution's *ex post facto* prohibition bars an increased penalty from applying to offenders who committed crimes before Congress enacted the FSA. For any statute that contains ameliorative provisions and increased penalties, the heightened punishment cannot Constitutionally apply to pre-enactment crimes. Yet, Congress is still empowered to make the ameliorative provisions apply retroactively if it so chooses.

Finally, Amicus contends that Congress could not have intended the FSA to apply retroactively, because it would lead to the "absurd" result that a criminal penalty would depend on the timing of the federal sentencing proceeding. (Am. Br. 47 (citing *McNeill v. United States*, 131 S. Ct. 2218, 2223 (2011))). That is, for a pre-enactment offender, whether the FSA's recalibrated mandatory minimums applied would turn on whether sentencing occurred before or after August 3, 2010. According to Amicus, that interpretation is so "odd" that Congress could not have intended it. (Am. Br. 47).

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[4] In any event, Amicus' speculations about whom Congress believed was deserving of leniency are utterly without grounding. Congress could have felt that entitlement to a non-disparate sentence should not depend on whether the government believes that the defendant truthfully gave up "all information and evidence" concerning his course of conduct. But there is no proof either way.

That attack betrays a strange misunderstanding of the way that sentencing has worked in the federal system for the past 25 years. The Sentencing Reform Act instructs a sentencing court to apply the Guidelines in effect on the date the defendant is sentenced, 18 U.S.C. § 3553(a)(4)(ii), and through that provision Congress has in fact expressly provided for federal penalties to depend on the date of sentencing. Contrary to Amicus's assumptions, Congress viewed that rule as *promoting* consistency in sentencing, not thwarting it. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983) ("To impose a sentence under outmoded Guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing."). Thus, it is hardly surprising, and is in fact entirely to be expected, that the FSA's revisions to crack sentencing provisions must be understood and applied to conform to this longstanding sentencing rule expressly set forth by Congress.

McNeill was dealing with a different kind of situation. Initially, the focus of the statutory provision in *McNeill* was not upon the date of the underlying criminal conduct, but rather upon the date of conviction. The Court stated that "[t]he plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense *at the time* *of his conviction for that offense.*" *McNeill*, 131 S. Ct. at 2221-22 (emphasis added). The Court does state that "McNeill cannot explain why two defendants who violated § 922(g) on the same day and who had identical criminal histories—down to the dates on which they committed and were sentenced for their prior offenses—should receive dramatically different federal sentences solely because one's § 922(g) sentencing happened to occur after the state legislature amended the punishment for one of the shared prior offenses." *Id.* at 2223-24. But that observation is not relevant to Petitioner's position that Congress, by fair implication, intended that the ameliorative provisions of the FSA apply to all pre-enactment offenders whose cases were not final at the date of the FSA's enactment, regardless of when they were sentenced.

B. Section 10 Fairly Implies That Congress Intended The FSA To Be Retroactive.

The FSA's directive to the Commission to prepare a report to Congress regarding the impact of the FSA five years hence fairly implies that Congress intended the immediate application of its provisions, including retroactive application of any ameliorative Guideline amendments. FSA § 10, 124 Stat. at 2375. Otherwise, during much of the time period in which the Commission would be studying the effects of the FSA, the old penalty structure would remain intact. That result would undermine Congress's goal to compile useful data about the FSA's impact on federal sentencing.

Although Amicus speculates that "it is hardly likely that the bulk of offenders sentenced during [the five year post-enactment period] will have committed their offenses before the FSA was enacted," and concludes that "the Commission should have more than adequate data even if the FSA applies only prospectively" (Am. Br. 14), he ignores the express directive by Congress that the Commission's study and report address the impact of the "*changes* to federal cocaine sentencing law" "under this Act and the amendments made by this Act." FSA § 10, 124 Stat. at 2375. The Congressional mandate to the Commission was, clearly and specifically, to assess the result of such "changes," which could only be accomplished by evaluating sentencings under the FSA's revised statutory and Guidelines provisions. There is nothing stated in § 10 that suggests Congress intended the study and report by the Commission to consider and address cocaine sentencings under the pre-enactment mandatory minimum sentences, which had been in effect for more than a quarter century.

To support his argument, Amicus equates "impact," as used in FSA § 10, with the "decisions of those who violated federal law before the revised practices were in effect." (Am. Br. 46). No such limitation on the scope of the assessment of the impact of the provisions of the FSA is evident in § 10 or elsewhere in the Act. It is equally plausible that Congress intended to study the real-world difference that the FSA would have on sentencing results. To meaningfully fulfill this objective, the Commission would be required to compare two sets of data: Sentences handed down for pre-enactment offenders before August 3, 2010, and those handed down for post-enactment offenders after that date, regardless of when their offense conduct occurred.

C. The Legislative History And The Stated Purpose Of The FSA Provide Meaningful Support For The Implication Of Retroactivity.

Four prior versions of the bill enacted as the FSA included the provision that "There shall be no retroactive application of any portion of this Act." H.R. 265 § 11, 111th Cong. (2009); H.R. 4545 § 11, 110th Cong. (2007); S. 1383 § 204(b), 110th Cong. (2007); S. 1711 § 11, 110th Cong. (2007). The FSA does not include any such limitation, and the omission of this language supports the implication that Congress intended the ameliorative provisions of the statute to apply to pre-enactment offenders whose convictions had not become final. As this Court has held, "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Russello v. United States*, 464 U.S. 16, 23-24 (1983). With the anti-retroactivity provision having been included in *four* prior versions of the bill, the suggestion by Amicus that the deletion may not have been "deliberate" (Am. Br. 53) is, at best, implausible.

In arguing that "Congress merely omitted language that would do what Section 109 already does," for which there is no support in the legislative history, Amicus claims support for his speculation as to Congressional motive from *Marcello v. Bonds* (349 U.S. 302, 309 (1955)), discussed previously. (Am. Br. 53). The partial quote offered by

Amicus does not reveal that the cited deletion, "(n)otwithstanding any other law, including the [Administrative Procedure Act]," from earlier versions of the INA was "possibly" explained as being unnecessary in view of the remaining language of the section: "The procedure (herein prescribed) shall be the sole and exclusive procedure for determining the deportability of an alien under this section." *Marcello*, 349 U.S. at 309. The Court in *Marcello* was not speculating as to how Congress might have considered the necessity of a provision in light of the fictional incorporation of a distinct statute, to which it was not bound, but rather two proposed clauses in the same statutory provision in the bill under consideration. Although potential redundancy might be fairly inferred on the circumstances of *Marcello*, to do so in this case, without any support in the legislative history, would be pure speculation. A more reasonable inference, one supported by the text, other legislative history, and stated purpose of the FSA, is that Congress intended that the ameliorative provisions of the FSA apply retroactively.

Amicus makes no attempt to answer the lingering question why Congress would want district courts to continue to impose sentences under a system that it has already declared to be unfair. Instead, he makes the unsupported assertion that "it is *obvious* from the text and history of the FSA that the statute resulted from legislative compromises." (Am. Br. 51). Although Amicus argues that the 18-to-1 ratio reflects such a compromise, he points to nothing in the legislative history to support his allusion that compromise was the basis for deletion of the anti-retroactivity provision in the final bill. In fact, no such history exists.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated and the case remanded for resentencing in accordance with the FSA.

April 9, 2012

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REPLY
BRIEF

Nos. 11-5683 and 11-5721

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EDWARD DORSEY, SR., PETITIONER

v.

UNITED STATES OF AMERICA

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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TABLE OF CONTENTS

Page

A. Amicus misstates the inquiry under Section 109 3

B. Congress intended that the FSA's statutory reforms apply immediately in all initial sentencing proceedings 6

C. The history and purposes of the FSA confirm that Congress intended courts to apply the Act's reforms immediately 18

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981) 14

Carcieri v. *Salazar*, 555 U.S. 379 (2009) 4

Dillon v. *United States*, 130 S. Ct. 2683 (2010) 5

Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 4

Great N. Ry. Co. v. *United States*, 208 U.S. 452 (1908) 2, 4

Hertz v. *Woodman*, 218 U.S. 205 (1910) 4

Kimbrough v. *United States*, 552 U.S. 85 (2007) 8

Lockhart v. *United States*, 546 U.S. 142 (2005) 4

McNeill v. *United States*, 131 S. Ct. 2218 (2011) 15, 16

Morton v. *Mancari*, 417 U.S. 535 (1974) 4

Neal v. *United States*, 516 U.S. 284 (1996) 9

Rodriguez v. *United States*, 480 U.S. 522 (1987) 20

Spears v. *United States*, 555 U.S. 261 (2009) 8

United States v. *Booker*, 543 U.S. 220 (2005) 17

United States v. *Dixon*, 648 F.3d 195 (3d Cir. 2011) 18

United States v. *Douglas*, 644 F.3d 39 (1st Cir. 2011) 9

Cases—Continued: Page

United States v. *Holcomb*, 657 F.3d 445 (7th Cir. 2011) 9, 11, 15, 20

Vartelas v. *Holder*, No. 10-1211 (Mar. 28, 2012) 5

Warden v. *Marrero*, 417 U.S. 653 (1974) 2, 4

Constitution, statutes, and guidelines:

U.S. Const. Art. I, § 10, Cl. 1 (Ex Post Facto Clause) . . . 17

Act of Oct. 30, 1995, Pub. L. No. 104-38:

- §§ 1, 2(a)(1)(A), 109 Stat. 334 11
- § 2(a)(2), 109 Stat. 335 12

Armed Career Criminal Act, 18 U.S.C. 924(e) 15

Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 1

- Pmbl., 124 Stat. 2372 . . . . 2, 12
- § 2, 124 Stat. 2372 4
- §§ 2-3, 124 Stat. 2372 2
- § 4, 124 Stat. 2372-2373 17
- §§ 5-7, 124 Stat. 2373-2374 2
- § 7, 124 Stat. 2374 16
- § 8, 124 Stat. 2374 . . . . 2, 6, 7, 8, 10
- § 10, 124 Stat 2375 17

Sentencing Act of 1987, Pub. L. No. 100-182, § 21(a), 101 Stat. 1266, 1271 7

Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987 14

1 U.S.C. 109 . . . . 2, 3, 4, 14

18 U.S.C. 751(a) 15

18 U.S.C. 3146 15

Statutes and guidelines—Continued: Page

18 U.S.C. 3553(a)(4)(A)(ii) . . . . *passim*
18 U.S.C. 3553(a)(5)(B) 14
18 U.S.C. 3553(f) 11
18 U.S.C. 3582(b) 5
18 U.S.C. 3582(c) 14
21 U.S.C. 841(b) 4
28 U.S.C. 994(u) 5, 14
United States Sentencing Guidelines:
  § 1B1.11(b)(1) 17
  § 2D1.1(c) 7, 16
  § 3C1.1 15
  § 5G1.1(b) 10
  Ch. 1, Pt. A, Subpart 1.3 (2011) 13

Miscellaneous:

156 Cong. Rec. (daily ed.):
  p. H6202 (July 28, 2010) 18
  p. S1683 (Mar. 17, 2010) 18
75 Fed. Reg. 66,188 (Oct. 27, 2010) 10
W.S. Gilbert & Arthur Sullivan, "I Am The Very Model of a Modern Major-General," *The Pirates of Penzance* act 1 13
H.R. Rep. No. 272, 104th Cong., 1st Sess. (1995) 11
S. Rep. No. 223, 98th Cong., 1st Sess. (1983) 15

Miscellaneous—Continued: Page

U.S. Sentencing Comm'n:

Report to the Congress: Cocaine and Federal Sentencing Policy (May 2002) 8, 11, 18

Report to the Congress: Cocaine and Federal Sentencing Policy (May 2007) 7, 8

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REPLY BRIEF FOR THE UNITED STATES

For nearly 25 years, Congress required federal courts to impose severe mandatory minimum sentences on crack cocaine offenders—mostly racial minorities—based on assumptions about crack cocaine now universally recognized to be unfounded. In the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, Congress acknowledged the error and "restore[d] fairness to Federal cocaine sentencing" by drastically reducing the crack/powder sentencing disparity, repealing the mandatory minimum penalty for the simple possession of crack cocaine, and directing the Sentencing Commission to implement the changes made by the FSA "as soon as practicable" by issuing "emergency" amendments to the Sentencing Guidelines to "conform[]" the Guidelines to "applicable law." FSA Pmbl. & §§ 2-3, 8, 124 Stat. 2372, 2374.

The Court-appointed amicus curiae contends that, notwithstanding the urgency of Congress's directive to the Sentencing Commission, Congress intended district courts to continue to impose mandatory minimum sentences under pre-FSA law for five more years—in effect, extending the tenure of the discredited 100-to-1 ratio in federal sentencing law by more than one-fifth. In amicus's view, that result is required by the general saving statute, 1 U.S.C. 109, which, amicus suggests, precludes applying the new law to pre-FSA offenders even when they are sentenced after the FSA has become effective.

Amicus's invocation of Section 109 is misplaced. That provision must yield to the more recent expression of congressional intent. The FSA gives rise to a "necessary" or "fair implication," *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908); *Warden* v. *Marrero*, 417 U.S. 653, 659 n.10 (1974), that the new mandatory minimum thresholds provide the "applicable law" in post-FSA sentencings. FSA § 8, 124 Stat. 2374. Amicus characterizes that result as "rank arbitrariness" (Br. 48) because it differentiates defendants based on the date of sentencing. But that is the ordinary rule under the Sentencing Reform Act, which directs federal courts to use the Sentencing Guidelines in effect on the date of sentencing, regardless of the date of the underlying offense. 18 U.S.C. 3553(a)(4)(A)(ii). Every indication of congressional intent supports the conclusion that Congress regarded its new mandatory minimum scheme as the "applicable law" to which the Sentencing Commission was to conform the Guidelines on an emergency basis. That overcomes the default rule under Section 109.

Amicus does not dispute the gross sentencing anomalies that result when mandatory minimum penalties based on a 100-to-1 ratio override Guidelines based on an 18-to-1 ratio. He offers no adequate explanation why Congress would have wanted to perpetuate such a striking disconnect between mandatory minimum penalties and the new Guidelines that it directed the Commission to issue "as soon as practicable." Nor does amicus suggest any reason why Congress would have extended the severe and racially disparate effects of the 100-to-1 ratio far into the future. The answer is clear: it did not.

A. Amicus Misstates The Inquiry Under Section 109

The government agrees with amicus that the FSA is the sort of ameliorative change in criminal law that triggers an inquiry under the general federal saving statute, 1 U.S.C. 109. See Amicus Br. 19-35. In defending the court of appeals' application of Section 109 here, however, amicus mistakenly equates the default *interpretive* rule supplied by Section 109 with *substantive* legislation that a later Congress will not be presumed to have displaced unless the later legislation satisfies the stringent standard for finding an implied repeal of a federal statute. See Br. 18 (asserting that, for petitioners to prevail, "the Court *must* find that the FSA amounts to a partial implied repeal" of Section 109).

That is not the correct inquiry. Section 109 does not specify the applicable penalties for crack cocaine offenses, and the Congress that enacted the FSA in 2010 was not required to "repeal" it, impliedly or otherwise, to alter the substantive law governing federal cocaine sentencing. (By contrast, it *was* necessary for the FSA to repeal the provisions of 21 U.S.C. 841(b) that created the 100-to-1 ratio, and no one doubts that it did so. See FSA § 2, 124 Stat. 2372.) This Court reviews skeptically claims that one federal statute has impliedly repealed another, see, *e.g.*, *Carcieri* v. *Salazar*, 555 U.S. 379, 395 (2009), because both Congresses—the earlier and the later—had the constitutional authority to enact binding legislation, and federal courts "are not at liberty to pick and choose among congressional enactments" if those enactments are "capable of co-existence." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974).

"Clear statement" statutes such as Section 109, however, stand on a different footing. Such statutes do not prescribe binding rules of law, but provide background principles that purportedly act on *future* Congresses. As this Court has repeatedly explained, however, "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). Because it was the prerogative of the Congress in 2010 to "make its will known in whatever fashion it deem[ed] appropriate," *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring), amicus errs in suggesting that Section 109 controls unless Congress "repealed" it in the FSA. Rather, Section 109 supplies a default rule of interpretation that is overcome if Congress has expressed a different intention "either expressly or by necessary implication in a subsequent enactment." *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908); see also *id.* at 466 ("by fair implication"); *Warden* v. *Marrero*, 417 U.S. 653, 660 n.10 (1974) ("by fair implication"); *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910) ("by clear implication").

In urging that Section 109 dictates the conclusion reached by the court of appeals, amicus inaccurately characterizes the issue in these cases as one of "retroactivity." As an initial matter, no party suggests that the FSA's sentencing reforms require a federal court to reopen final judgments or modify mandatory minimum terms of imprisonment imposed before the FSA's enactment. Cf. 18 U.S.C. 3582(b) (a judgment of conviction that includes a sentence of imprisonment "constitutes a final judgment"). The FSA applies only to pending cases that have not reached the sentencing phase. See Gov't Br. 53-54. And applying the FSA's reduced drug-quantity thresholds to offenders, such as petitioners, who had *not* yet been sentenced on the date of the FSA's enactment does not involve a "retroactive" application of the Act in any relevant sense. Cf. *Vartelas* v. *Holder*, No. 10-1211 (Mar. 28, 2012), slip op. 2 (federal statute triggered the presumption against retroactivity because it "attached a new *disability* * * * in respect of past events" (emphasis added)).

That petitioners' criminal conduct occurred before the FSA's enactment does not make the Act "retroactive" in application, any more than application of an ameliorative Guidelines change based on the date of sentencing is "retroactive." A change to the Sentencing Guidelines that reduces the penalty for an offense unquestionably applies immediately in all initial sentencing proceedings, irrespective of the date of the underlying criminal conduct. 18 U.S.C. 3553(a)(4)(A)(ii). But such an amendment becomes "retroactive" only if the Commission separately votes to make it available as a basis for modifying a sentence of imprisonment previously imposed. 28 U.S.C. 994(u); see, *e.g.*, *Dillon* v. *United States*, 130 S. Ct. 2683, 2688 (2010) (distinguishing between the Commission's "authority to revise the Guidelines" and its power "to determine when and to what extent a revision will be retroactive"). Likewise here, the FSA's effect in sentencing proceedings that had not yet been conducted as of August 3, 2010, is not correctly characterized as a problem of "retroactivity," and presumptions concerning retroactivity have no role to play. Rather, the issue reduces to one of congressional intent: whether the necessary or fair implication of the FSA is that Congress's reforms of the discredited crack/powder ratio apply in post-FSA sentencings.

B. Congress Intended That The FSA's Statutory Reforms Apply Immediately In All Initial Sentencing Proceedings

1. Amicus acknowledges (Br. 40) that it is "possible" to read the FSA as directing the Sentencing Commission to implement the FSA's new crack/powder ratio through emergency amendments, *i.e.*, to conform the Guidelines to the FSA as "applicable law." But amicus suggests that this reading is not "unavoidable" and that it is possible to interpret Section 8 of the FSA as addressed only to the Guidelines amendments contemplated by Sections 5-7 of the Act, which do not concern the crack/powder ratio. Amicus does not posit any reason why Congress would have wanted Sections 5-7, but *not* the Act's signature change to the crack/powder disparity, to be placed in effect "as soon as practicable." Even more to the point, amicus does not explain how that construction of Section 8 can be reconciled with the plain terms of that provision, which directs the Commission to "conform[]" the Guidelines to "applicable law." As amicus does not seriously dispute, the phrase "applicable law" in this context must encompass the FSA, since the version of the Guidelines in effect on August 3, 2010, *already* reflected pre-FSA sentencing law: the only "conforming amendments" necessary were those required to bring the Guidelines in line with the FSA itself. See Gov't Br. 28.

The extensive efforts in Congress and the Sentencing Commission to address the anomalies created by the 100-to-1 ratio, which amicus fails to address, confirm that Congress intended the Commission to use the emergency authority in Section 8 to conform the Guidelines to the new statutory minimums. See generally Gov't Br. 3-11. The Sentencing Commission had by 2007 described the need to abolish the 100-to-1 ratio as both "urgent and compelling." U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 9 (May 2007) (2007 Report). In urging Congress to do so, the Commission had specifically requested that Congress provide it with emergency amendment authority "to incorporate the statutory changes" into the Guidelines as soon as possible. *Ibid.* Such authority, the Commission emphasized, "would enable the Commission to *minimize the lag between any statutory and guideline modifications* for cocaine offenders." *Ibid.* (emphasis added). Congress responded in Section 8 of the FSA not only by granting the Commission the authority it requested, but by directing it to exercise that authority "as soon as practicable." 124 Stat. 2374.

Amicus contends (Br. 41-43) that Congress required the Commission to act quickly merely out of concern that, absent emergency authority, some *post-enactment* offenders might be sentenced before the Commission could revise the Drug Quantity Table in Sentencing Guidelines § 2D1.1(c). But Congress could rationally assume that relatively few post-enactment offenders would face sentencing in the immediate wake of the FSA. Yet Congress was not content to allow the Commission its usual time for developing new Guidelines. Instead, it (i) revived the Commission's expired authority under Section 21(a) of the Sentencing Act of 1987 to issue emergency Guidelines without awaiting congressional approval; (ii) directed the Commission to issue Guidelines implementing the FSA "as soon as practicable," and (iii) specified that "in any event" the Commission was to promulgate its revised Guidelines "not later than 90 days" after the FSA's enactment. FSA § 8, 124 Stat. 2374. Those revised Guidelines, as Congress knew, would be immediately effective for *all* offenders, including pre-enactment offenders. 18 U.S.C. 3553(a)(4)(A)(ii). The urgency expressed in Section 8's directive to the Commission therefore strongly reveals Congress's intent that the FSA's reforms govern the sentencing of pre-enactment offenders—the only significant category of offenders likely to face sentencing on the 91st day.

Indeed, Congress expressly contemplated in Section 8 that the Commission might issue its Guidelines *before* 90 days had elapsed ("as soon as practicable")—hardly an implausible scenario, given that the FSA essentially adopted the Commission's own 2002 proposals for cocaine sentencing reform. See *Report to the Congress: Cocaine and Federal Sentencing Policy* 104 (May 2002) (2002 Report); see also 2007 Report 8 & n.26. If the Commission had issued its emergency Guidelines amendments on the first day following the FSA's enactment, those emergency amendments would have affected *only* pre-enactment offenders for weeks or months thereafter.[1] Yet on amicus's view, the Act's signature reform to the statutory penalties—that is, the "applicable law" that warranted the emergency changes in the Drug Quantity Table in the first place—would be inapplicable to such offenders. Amicus thus errs in suggesting (Br. 43-44) that Congress's directive to the Commission in Section 8 has no bearing on whether the Act's revised statutory penalties apply to pre-enactment offenders. See Gov't Br. 31-35.

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[1] Amicus is therefore mistaken in contending (Br. 43 n.10) that the 90-day deadline imposed by Congress somehow demonstrates that Congress was indifferent about the application of the FSA to pre-enactment offenders. Congress directed to the Commission to act "as soon as practicable." § 8, 124 Stat. 2372. That Congress added a hard 90-day deadline as a back-stop does not suggest indifference to the fate of pre-enactment offenders sentenced in the interim, especially since those offenders could benefit from the district court's authority, recognized in *Kimbrough* v. *United States*, 552 U.S. 85 (2007), and *Spears* v. *United States*, 555 U.S. 261 (2009) (per curiam), to vary from crack/powder ratio in the Guidelines. See Gov't Br. 29-30.

2. Amicus also discounts (Br. 43) Congress's knowledge that, under 18 U.S.C. 3553(a)(4)(A)(ii), the newly promulgated Guidelines amendments would apply to all initial sentencing proceedings. In amicus's view, this reality has scant relevance because the Guidelines "cannot trump" a statutory penalty. Br. 43 (citing *Neal* v. *United States*, 516 U.S. 284, 289-290, 295 (1996)). No one suggests that the emergency Guideline amendments required by Section 8 "trump" the pre-FSA mandatory penalties of their own force. Rather, "the question is whether the new statute, by changing the statutory minimum sentences and ordering the Commission forthwith to change its guidelines to comply with the new minimums, 'fairly implies' that the new minimums govern all sentences imposed after the new statute took effect." *United States* v. *Holcomb*, 657 F.3d 445, 461 (7th Cir. 2011) (Posner, J., dissenting from denial of rehearing en banc). Only one answer makes sense: a Guidelines regime predicated on an 18-to-1 ratio is fundamentally inconsistent with statutory minimum penalties predicated on a ratio more than five times as severe. Congress could not have intended both to apply. As Judge Posner observed, "unless the Act's revised mandatory minimum sentences are also applicable to these defendants, they will receive sentences in excess of the sentencing guidelines that Congress," through its emergency directive to the Sentencing Commission, "intended would apply to such defendants." *Id.* at 462; see also *United States* v. *Douglas*, 644 F.3d 39, 44 (1st Cir. 2011) (Boudin, J.) (finding that scenario "unrealistic").

Amicus's only response (Br. 43-44) to this statutory dilemma is that the Guidelines would technically conform to the pre-FSA mandatory minimum penalties in such circumstances because, under Sentencing Guidelines § 5G1.1(b), a higher statutory penalty becomes the offender's Guidelines sentence. But if Congress had been content with that solution, much of Section 8 of the FSA would have been for naught: the Commission would have had no need to "conform[]" the Guidelines to "achieve consistency" with the FSA's revised drug-quantity ratio, let alone do so on an emergency basis, because the statutory provisions would automatically control under Section 5G1.1(b). Congress plainly intended for the Commission to "achieve consistency" between the Guidelines and the FSA's reforms in a more meaningful sense. The Commission itself well understood Congress's message. See 75 Fed. Reg. 66,188, 66,191 (Oct. 27, 2010) (explaining that the Commission implemented Congress's instructions in Section 8 by using the FSA's revised statutory trigger quantities for mandatory minimum penalties as reference points and extrapolating upward and downward, thereby ensuring that the FSA's 18-to-1 ratio is "consistently and proportionally reflected throughout the Drug Quantity Table"). Indeed, the Commission has generally not relied on Section 5G1.1(b) to reconcile the Guidelines with statutory minimum penalties in the federal drug laws. See Gov't Br. 36-38.

Apart from citing Section 5G1.1(b), amicus nowhere explains why Congress would have directed the Commission to issue emergency Guidelines amendments applicable in initial sentencing proceedings for *all* offenders "as soon as practicable," yet *also* intended that pre-enactment offenders remain subject to 100-to-1 statutory penalties. Amicus does not dispute the extreme anomalies in sentencing that would result from imposing statutory penalties based on a 100-to-1 ratio when Guideline ranges are based on an 18-to-1 ratio. The pre-FSA statutory penalties would override the post-FSA Guidelines ranges across a wide spectrum of common drug quantities, in some cases requiring district courts to impose prison sentences as much as *five times longer* than the minimum applicable Guidelines sentence. See generally Gov't Br. 40 (table); see also *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting from denial of rehearing en banc) (providing similar "perverse" examples). Such results cannot reasonably be attributed to congressional intent.[2]

Congress has previously condemned such anomalies in the specific context of federal cocaine sentencing reform. See Gov't Br. 32-33. In 1995, Congress rejected the Sentencing Commission's original proposal to eliminate the crack/powder disparity from the Guidelines. It did so in part because it concluded that a 1-to-1 ratio was too low. See Act of Oct. 30, 1995, Pub. L. No. 104-38, §§ 1, 2(a)(1)(A), 109 Stat. 334. But it also emphasized the unacceptable sentencing disparities that would result from such a Guidelines revision without simultaneous changes to the statutory minimum penalties. H.R. Rep. No. 272, 104th Cong., 1st Sess.

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[2] Amicus would discount (Br. 44-45) the anomalies created under the court of appeals' interpretation of the FSA on the ground that the safety-valve provisions of 18 U.S.C. 3553(f) will exempt some nonviolent crack offenders with limited criminal histories from the effects of the pre-FSA mandatory minimums. That argument suggests that Congress could not have been concerned with the fate of offenders who failed to qualify for safety-valve relief. But Congress enacted the FSA to reduce the crack/powder disparity for *all* offenders, not just those who qualify for safety-valve relief, because it recognized that the 100-to-1 ratio resulted in disproportionately severe sentences and had a disparate impact on racial minorities, thereby "foster[ing] disrespect for and lack of confidence in the criminal justice system." 2002 Report 103.

4 (1995) (1995 House Report). The House Report emphasized that, regardless of the correct crack/powder ratio, it would make no sense for the Sentencing Commission to adopt a ratio under the Guidelines that was significantly out of proportion with the governing statutory minimum penalties: "[I]f the Commission's guideline amendments went into effect without Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities." *Id.* at 4. In particular, the report observed, such as scheme would cause "minor quantity differences" to assume a significance in sentencing vastly disproportionate to any difference in actual culpability. See *id.* at 10. Congress accordingly directed the Commission to propose a "revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes *and* guidelines." § 2(a)(2), 109 Stat. 335 (emphasis added).

Amicus fails to address this history. Yet the court of appeals' interpretation of the FSA creates the same "gross sentencing disparities" attributable to "minor quantity differences" that Congress condemned in 1995. For example, a pre-enactment offender who distributed 4.9 grams of crack cocaine (assuming a criminal history category of II and no other aggravating or mitigating factors) would face a minimum advisory Guidelines range of 24 months under the Commission's post-FSA amendments. But if amicus were correct, an otherwise identical pre-enactment offender who distributed just 0.1 grams more would face a statutory minimum sentence of 60 months—a term of imprisonment two and one-half times longer, equivalent to the post-FSA advisory sentence for an offender who distributes more than 20 grams of crack. Amicus fails to explain why Congress would have intended that the FSA—a statute enacted to "restore fairness to Federal cocaine sentencing," Pmbl., 124 Stat. 2372—create outcomes so fundamentally at odds with the Sentencing Reform Act's promise of proportionality in sentencing. See Sentencing Guidelines Ch. 1, Pt. A, Subpart 1.3 (explaining that, in reforming federal sentencing practices, "Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of different severity"). "Only in comic opera" (Amicus Br. 53) would legislators have such "a pretty taste for paradox."[3]

Amicus likewise fails to address another peculiar consequence of the court of appeals' interpretation of the FSA: for a wide variety of common drug quantities, the pre-FSA mandatory minimums would override the relevant post-FSA Guidelines ranges in their entirety. See Gov't Br. 40-43 & n.11. That is, for many pre-enactment offenders, the amended Guidelines that Congress directed the Commission to promulgate under the FSA would be completely irrelevant in operation—the pre-FSA statutory penalty would always be higher. It is difficult to understand why Congress would have directed the Commission to act "as soon as practicable" in crafting new Guidelines that would be wholly inapplicable to the largest category of offenders likely to face sentencing in the immediate months following the adoption of those Guidelines. See Gov't Br. 42-43.

3. Amicus contends that the "FSA's most important textual feature" is not Congress's urgent directive to the Commission, but rather "its failure to say a single word" (Br. 39) about the applicability of the Act to pre-enactment offenders. In amicus's view, the absence of an express provision for such offenders is dispositive because of the assumption that Congress "legislated with [Section 109] in

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[3] W.S. Gilbert & Arthur Sullivan, "I Am The Very Model of a Modern Major-General," *The Pirates of Penzance* act 1.

mind." Br. 40 (quoting *Albernaz* v. *United States*, 450 U.S. 333, 341-342 (1981) (bracketed language added)).

That approach to Section 109 ignores this Court's recognition that when a necessary or fair "*implication*" arises from a statute, it overrides Section 109's default rule. See p. 4, *supra*. Amicus is correct (Br. 40) that "legal context" matters in construing the FSA, but here, the relevant context is the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. II, 98 Stat. 1987, which established the basic framework for all federal sentencing determinations. Under that framework, a district court considers the advisory Guidelines in effect on the date of sentencing—including any ameliorative amendments that may have taken effect since the date of the underlying offense conduct. See 18 U.S.C. 3553(a)(4)(A)(ii) and (5)(B). At the same time, courts are generally barred from disturbing a sentence of imprisonment after it has been imposed. See 18 U.S.C. 3582(c). By directing the Sentencing Commission to implement the FSA "as soon as practicable" through emergency amendments to "conform[]" the Guidelines with "applicable law," Congress expressly invoked the machinery of the Sentencing Reform Act.[4]

Amicus overlooks this legal context in his repeated contention (*e.g.*, Br. 17, 39, 50) that Congress could not have intended to tie the FSA's sentencing reforms to the date when an offender is sentenced (rather than the date of the offense). Echoing Chief Judge Easterbrook, see *Holcomb*, 657 F.3d at 448, amicus characterizes that approach as "partial retroactivity" (Br. 17) and asserts that it would produce consequences "sufficiently odd that Congress could not have intended it" (Br. 47). But Congress embraced that assertedly "odd" notion in the text of the Sentencing Reform Act. See 18 U.S.C. 3553(a)(4)(A)(ii). And far from being odd, having the sentencing court apply current law fulfills the Sentencing Reform Act's "philosophy" that the Sentencing Guidelines should reflect the "most sophisticated" understanding of which penalties "will most appropriately carry out the purposes of sentencing." S. Rep. No. 223, 98th Cong., 1st Sess. 74 (1983); see Gov't Br. 54-55.[5]

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[4] Congress thus knew that the amended Guidelines would apply prospectively in all initial sentencing proceedings, regardless of the date of the underlying offense conduct. 18 U.S.C. 3553(a)(4)(A)(ii). In contrast, although Congress has authorized the Sentencing Commission, in its discretion, to make Guidelines amendments that reduce prison terms retroactively available to previously sentenced offenders, it has not required the Commission to take that step, 28 U.S.C. 994(u), and thus could not have known whether the Commission's post-FSA amendments would ultimately have retroactive effect.

McNeill v. *United States*, 131 S. Ct. 2218 (2011), does not assist amicus (Br. 15, 47). *McNeill* interpreted the Armed Career Criminal Act (ACCA), 18 U.S.C. 924(e), which imposes a 15-year mandatory minimum sentence on a defendant convicted of unlawful possession of a firearm if, *inter alia*, the defendant has three prior convictions for a "serious drug offense." 18 U.S.C. 924(e)(1). The Court held that whether a state conviction qualifies as a "serious drug offense" under the ACCA depends on the maximum sentence that could have been imposed for the offense at the time of the defendant's state conviction, rather than on the content of state law at the time of the later federal sentencing proceeding. 131 S. Ct. at 2224. The Court based its holding on the "plain text of ACCA," *id.* at 2221, and on the Court's previous interpretation of adjacent definitions in the ACCA, *id.* at 2222-2223. But the Court also identified a number of reasons why, in the particular context of the ACCA, it would be "absurd" to permit the statute's applicability to "depend on the timing of the federal sentencing proceeding." *Id.* at 2223. The Court reasoned that it would frustrate Congress's plain intent in the ACCA if "subsequent changes in state law can erase an earlier conviction for ACCA purposes." *Ibid.* "Congress based ACCA's sentencing enhancement on prior convictions and could not have expected courts to treat those convictions as if they had simply disappeared." *Ibid.*

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[5] Amicus speculates (Br. 47) that crack offenders might have engaged in "strategic misconduct," such as "fugitivity," to postpone the date of their sentencing hearings. To the extent such a risk exists, however, it exists any time the Sentencing Commission revises the Guidelines. The law generally deters and punishes such misconduct directly. See *e.g.*, 18 U.S.C. 751(a) (crime of escape); 18 U.S.C. 3146 (failure to appear); Sentencing Guidelines § 3C1.1 (obstruction of justice).

In enacting the FSA, by contrast, Congress expressly directed the Commission to issue emergency Guidelines amendments that Congress knew would be immediately applicable in all initial sentencing proceedings, even those involving pre-FSA conduct. 18 U.S.C. 3553(a)(4)(A)(ii). Indeed, *McNeill* notwithstanding, amicus does not dispute that the Guidelines changes required by Section 7 of the FSA, which instructed the Commission to cap or reduce the base offense level for certain offenders, see § 7, 124 Stat. 2374, were immediately effective in sentencing proceedings after November 1, 2010, regardless of the date of the underlying offense conduct. Nor does amicus dispute that the Commission's emergency changes to the Drug Quantity Table in Sentencing Guidelines § 2D1.1(c) were immediately effective for crack offenders not affected by mandatory minimum penalties. These uncontested applications of FSA-mandated Guidelines to pre-FSA conduct underscore that no *McNeil*-like timing rule based solely on the date of the offense applies in this statutory context.

Amicus correctly observes (Br. 37) that the FSA's increase in the maximum fines for federal drug offenders, see § 4, 124 Stat. 2372-2373, could not be applied to pre-enactment offenders under the Ex Post Facto Clause. But the inference that amicus would draw from that observation—that Congress must have meant to exclude pre-enactment offenders from the FSA's entire package of reforms—does not follow. To the contrary, by directing that the FSA should be implemented immediately through emergency amendments to the Sentencing Guidelines, § 8, 124 Stat. 2374, Congress plainly *did* contemplate that preenactment offenders who are sentenced after the FSA's enactment would get "the sweet without the bitter" (Br. 38). See 18 U.S.C. 3553(a)(4)(A)(ii).[6]

4. Finally, Congress's instruction to the Sentencing Commission to submit a report within five years of the Act's enactment on the "impact of the changes in Federal sentencing law under this Act and the amendments made by this Act," FSA § 10, 124 Stat. 2375, corroborates the inference that Congress intended the FSA's "changes" and "amendments" to be in full effect during that period. Particularly given the likely purpose of the study—to determine whether the FSA's package of reforms *does*, in fact, restore fairness and proportionality to federal cocaine sentencing and eliminate the disparate racial impact of the 100-to-1 ratio—it is doubtful that Congress directed the Commission to study "the impact" of the "amendments" made by the

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[6] The Guidelines provide an exception for when applying the version of the Guidelines in effect on the date of sentencing would violate the Ex Post Facto Clause. See Sentencing Guidelines § 1B1.11(b)(1). While that provision had force when the Guidelines were mandatory, in the government's view, the advisory nature of the Guidelines after *United States* v. *Booker*, 543 U.S. 220 (2005), removes any ex post facto concerns. See Gov't Br. 29 n.6.

FSA in a period in which those amendments "would not consistently apply." *United States* v. *Dixon*, 648 F.3d 195, 202 (3d Cir. 2011).

C. The History and Purposes of the FSA Confirm That Congress Intended Courts To Apply The Act's Reforms Immediately

The necessary and fair implication from the FSA's text is confirmed by its history and purposes: to end the racially disparate and disproportionate punishments produced by the 100-to-1 ratio.

1. Amicus acknowledges that the available legislative history of the FSA reflects a "widespread and forceful critique of the 100-to-1 ratio" and of the "racial disparities engendered by the old system" (Br. 50). The legislative debates preceding the passage of the FSA leave no doubt that the unintentional—but undeniable—racial disparity produced by the 100-to-1 ratio deeply disturbed members of Congress. The Sentencing Commission had long warned Congress that the disparate racial impact of the 100-to-1 ratio "foster[ed] disrespect for and lack of confidence in the criminal justice system." 2002 Report 103. Representative Dan Lungren, one of the original authors of the 1986 legislation that created the 100-to-1 ratio, supported the FSA because of the "sad iron[y]" that "a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue." 156 Cong. Rec. H6202 (daily ed. July 28, 2010). In a letter to the Senate Judiciary Committee, the president of the NAACP Legal Defense Fund called the 100-to-1 ratio "one of the most notorious symbols of racial discrimination in the modern criminal justice system." 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010) (state-

ment of Sen. Leahy) (quoting letter from John Payton). That judgment, the legislative record makes plain, was not controversial among members of Congress. See Gov't Br. 46-47.

Against this background, it is hard to believe that Congress, in directing the Sentencing Commission to implement the FSA's reforms "as soon as practicable," nevertheless intended to leave the pre-FSA mandatory minimums in place for thousands of pre-enactment offenders who, like petitioners, had not yet been sentenced when the President signed the FSA into law. Contrary to amicus's view (Br. 52), it is not an "abuse" of legislative history to recognize that no member of Congress remotely defended, let alone supported, the racially disparate effects of a policy that the court of appeals' judgment would leave in place for years into the future. While the floor statements quoted above and in the government's opening brief (at 46-47) may be "isolated" (Br. 52) in the sense that each reflects the view of an individual legislator, amicus does not deny that those statements accurately convey both the widespread abhorrence among members of Congress of the unintended consequences of the 100-to-1 ratio and their opposition to allowing those consequences to continue.

Amicus would nevertheless disregard the legislative history on the ground that it does not speak "directly to the question of retroactivity" (Br. 50). But Congress's concern with the racially disparate effects of the 100-to-1 ratio bears directly on the question at issue in this case: whether Congress intended district courts to continue to impose sentences under that discredited policy for years into the future.

Amicus also acknowledges (Br. 52-54) that, in drafting the FSA, Congress specifically rejected statutory language that would have limited the application of the Act to offenses committed after the date of enactment. See Gov't Br. 44-45. Amicus contends that this history too is irrelevant because "[i]n failing to include an anti-retroactivity clause, Congress merely omitted language that would do what Section 109 already does" (Br. 53). But Congress did not merely "fail[] to include" a provision barring the Act's application to pre-enactment conduct; it specifically *deleted* such a provision from the predecessor bill on which the FSA was based.

2. No evident reason explains why Congress would have wanted sentencing courts to continue applying, for years after the FSA's enactment, the same disproportionately severe and racially skewed statutory penalties that it enacted the FSA to purge from federal law. Gov't Br. 47-48. Neither amicus, nor the members of the court whose judgment he defends, can hypothesize a reason. Cf. *Holcomb*, 657 F.3d at 450 (Easterbrook, C.J.) (acknowledging "no satisfactory answer"). Confronted with this question, amicus invokes a variety of generic propositions about statutory interpretation, including that "no legislation pursues its purposes at all costs," Br. 50 (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987)), and that "legislation involves compromises among competing values," *id.* at 15. Such propositions do not blunt the only logical inference from Section 8 of the FSA that Congress intended the Act's reforms to be immediately effective. Amicus is undoubtedly correct (Br. 51-52) that the Act's 18-to-1 ratio represents a compromise among legislators over the proper degree to which crack cocaine offenses should be punished more severely than powder offenses—that is, over what should *replace* the 100-to-1 ratio. But nothing in the Act or its legislative history remotely suggests that any member of Congress intended or believed that, after the FSA became effective, district courts would continue to impose

unjustifiably harsh new prison sentences under the discredited 100-to-1 ratio.

* * * * *

For the foregoing reasons and those set forth in the government's opening brief, the judgments of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

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APRIL 2012

AMICUS
CURIAE
BRIEF

RECORD
AND
BRIEFS

Supreme Court, U.S.
FILED
JAN 30 2012
OFFICE OF THE CLERK

Nos. 11-5683 & 11-5721

IN THE

Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

COREY A. HILL,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF ILLINOIS, THE LEADERSHIP CONFERENCE ON CIVIL AND HUMAN RIGHTS, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE SENTENCING PROJECT, FAMILIES AGAINST MANDATORY MINIMUMS, THE OPEN SOCIETY INSTITUTE, THE DRUG POLICY ALLIANCE, AND STOPTHEDRUGWAR.ORG, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

I. Congress Intended The Fair Sentencing Act To Apply In All Sentencing Proceedings That Occur After Its Enactment. 2

II. Congress Created The 100:1 Ratio In Response To A Media Frenzy And Without Any Evidentiary Basis. 8

  A. Both Scientific And Sociological Evidence Demonstrate That There Was No Justification For The 100:1 Ratio. 12

III. The 100:1 Ratio Resulted In Extreme Racial Disparities In Federal Cocaine Sentencing. 14

  A. The Racial Disparities Resulting From The 100:1 Ratio Have Had A Devastating Impact on Individual Lives. 17

  B. The United States Sentencing Commission Has Recognized The Discriminatory Impact Of The 100:1 Ratio Since 1995 And Urged Its Repeal. 19

  C. Federal Judges Have Condemned The Racially Discriminatory 100:1 Ratio For Decades. 22

D. Congress Understood The Discriminatory Consequences Of The 100:1 Ratio When It Passed The FSA And Explicitly Sought To Redress This Longstanding Injustice. 29

IV. This Court's Presumption That Congress Seeks To Avoid Unnecessarily Vindictive Punishments, Along With The Rule Of Lenity, Weigh In Favor Of Applying The New Crack/Powder Ratio To Petitioners. 33

CONCLUSION 36

APPENDIX 1a

STATEMENTS OF INTEREST 1a

TABLE OF AUTHORITIES

CASES

Fletcher v. Peck, 6 Cranch 87 (1810) 7

Great Northern Ry. Co. v. U.S.,
208 U.S. 452 (1908) 7

Hamm v. City of Rock Hill,
379 U.S. 306 (1964) 33, 34

Kimbrough v. U.S., 552 U.S. 85 (2007) 13, 28

Lockhart v. U.S., 546 U.S. 142 (2005) 7

Reynolds v. U.S., No. 10-6549 (Jan. 23, 2012) 8

Skilling v. U.S., 561 U.S. ---,
130 S. Ct. 2896 (2010) 34

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U.S. v. Armstrong, 517 U.S. 456, 479 (1996) 28

U.S. v. Brewer, 624 F.3d 900 (8th Cir. 2010) 10, 23

U.S. v. Clary, 846 F. Supp. 768 (E.D. Mo. 1994),
rev'd, 34 F.3d 709 (8th Cir. 1994) 9, 26

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2009 WL 424464 (N.D. Ill. 2009) 27

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(S.D.N.Y. 2005) 27

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(4th Cir. 2011) 28

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(N.D. Iowa 2009).. 27

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(M.D. Fla. 2006).. 2, 27

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(7th Cir. 2011).. 33

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(10th Cir. 2009) (per curiam) 28

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1993 WL 315987 (D. Neb. 1993) 12, 25

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(D. Neb. 1993)... 18, 25

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2009 WL 1448959 (S.D. N.Y. 2009) 27

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(C.D. Cal. 1993) 25

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(D.R.I. 2005)... 26

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(7th Cir. 1996).. 24

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(E.D. Wis. 2005)..................................... 2, 13, 26, 29

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(D. Neb. 1995) 26

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1 U.S.C. § 109.. 6, 7

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In pertinent part, at 21 U.S.C. § 841(b)
inter alia (2000))....................................... 3, 5, 10, 11

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Pub. L. No. 100-690, 102 Stat. 4181 (1988).......... 12

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("SORNA"), 120 Stat. 590,
42 U.S.C. §16901 *et seq.* (2006)................................ 8

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(statement of Sen. Mathias).................................... 10

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(statement of Rep. Johnson).................................... 32

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(statement of Rep. Scott).. 32

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INTEREST OF *AMICI*[1]

This *amicus curiae* brief is submitted on behalf of the American Civil Liberties Union, the ACLU of Illinois, The Leadership Conference on Civil and Human Rights, The National Association for the Advancement of Colored People, The Sentencing Project, Families Against Mandatory Minimums, Open Society Institute, The Drug Policy Alliance, and StoptheDrugWar.org. Each organization has special interest and/or expertise in criminal justice matters. Their statements of interest are set forth in an appendix to this brief.

SUMMARY OF ARGUMENT

Congress intended the Fair Sentencing Act of 2010 ("FSA"), which reduced the crack/powder ratio from 100:1 to 18:1, to apply to all sentences after its enactment. The statute's text and legislative history evince Congress's clear intent that the new crack/powder ratio immediately replace the old and discredited 100:1 ratio. *Amici* therefore join Petitioners and the United States in urging the Court to hold that Petitioners should not have been sentenced under the 100:1 ratio after Congress repudiated it as unfair and discriminatory.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amicus curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

Amici write separately to provide the Court with a history of the cocaine sentencing disparity—including how and why Congress created it, and the prodigious opposition it inspired from bench and bar for nearly two and a half decades as its irrationality and racially discriminatory consequences became increasingly clear. When Congress passed the FSA, it was widely accepted that the 100:1 ratio had no "penological or scientific justification." *U.S. v. Smith*, 359 F.Supp.2d 771, 777 (E.D.Wis. 2005), and "result[ed] in a disparate impact along racial lines, with black offenders suffering significantly harsher penalties." *U.S. v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (footnote omitted). This historical context is indispensable to understanding Congress's motivations in enacting the FSA, and it should bear on the Court's assessment of Congressional intent behind reducing the crack/powder disparity from 100:1 to 18:1. Moreover, the Court's presumption that Congress seeks to avoid unnecessarily vindictive punishment, as well as the rule of lenity, favor applying the reduced ratio to all sentences after the FSA's enactment.

ARGUMENT

I. Congress Intended The Fair Sentencing Act To Apply In All Sentencing Proceedings That Occur After Its Enactment.

Congress passed the FSA "[t]o restore fairness to Federal cocaine sentencing."[2] As the bill's chief sponsor stated on the floor of the Senate, "[e]very day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust."[3] Senator Dick Durbin (D-Ill.) further explained that when the FSA was "enacted into law, it w[ould] immediately ensure that every year, thousands of people are treated more fairly in our criminal justice system."[4] The "restor[ation]" of fair sentencing was necessary because the Anti-Drug Abuse Act of 1986[5] had created a sentencing scheme that unequally punished comparable offenses involving crack and powder cocaine—two forms of the same drug. Relying on perceived differences in the harmfulness and dangerousness of crack versus powder cocaine, the 1986 Congress created a 100:1 disparity between the amounts of crack versus powder cocaine necessary to trigger particular sentences. Thus, for example, someone convicted of an offense involving just five grams of crack cocaine was subject to the same five-year mandatory minimum federal prison sentence as someone convicted of an offense involving 500 grams of powder cocaine.

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[2] Pub. L. No. 111-220, 124 Stat. 2372 (2010).

There are two particularly glaring flaws of the 1986 Act which the 2010 Congress sought to remedy in the FSA when it reduced the 100:1 ratio. First, since the passage of the 1986 Act, empirical evidence has demonstrated that there is no scientific basis to support the supposed differences between crack and powder cocaine which Congress had initially relied upon in devising the 100:1 ratio. Second, the ratio, coupled with government enforcement priorities, gave rise to a racially discriminatory sentencing scheme. Under the 100:1 ratio, African American crack cocaine offenders were routinely given much harsher sentences than other cocaine offenders for comparable conduct. Indeed, by 2004, African Americans served virtually as much time in prison for a non-violent drug offense (58.7 months) as whites did for a violent offense (61.7 months).[6] Having become acutely aware of the discriminatory effects of the 100:1 ratio, Congress passed the FSA and reduced the ratio to 18:1. The sponsors "believe[d] this w[ould] decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities."[7]

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[3] 156 Cong. Rec. S1680-02, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).

[4] *Id.*

[5] Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended, in pertinent part, at 21 U.S.C. § 841(b) *inter alia* (2000)).

The FSA's text and legislative history demonstrate that Congress intended all crack cocaine offenders sentenced after the FSA's enactment on August 3, 2010, to be sentenced in accordance with the new law—even if their offense conduct occurred before the FSA.[8] To conclude otherwise would eviscerate Congress's actual intent, and mistakenly impute to Congress the intention to "restore fairness to Federal cocaine sentencing"[9] only for some defendants while allowing others to be sentenced under the old repudiated ratio even after the FSA went into effect.

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[6] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112 *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs03.pdf.

[7] Letter from Senators Durbin and Leahy to Attorney General Eric Holder (Nov. 17, 2010) *available at* http://www.fd.org/pdf_lib/fair-sentencing-act-ag-holder-letter-111710[1].pdf.

[8] The questions presented to the Court in Petitioners' cases differ only in that Petitioner Hill was sentenced after both the FSA and U.S. Sentencing Commission's Emergency Amendments—promulgated to implement the FSA, as required by that law—went into effect, whereas Petitioner Dorsey was sentenced after the enactment of the FSA but before the Guidelines Amendments went into effect.

That conclusion cannot be reconciled with either the FSA's overriding purpose or its specific provisions mandating speedy implementation. In particular, Section 8 of the FSA[10] requires the U.S. Sentencing Commission to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law" no later "than 90 days after the date of enactment of this Act."[11] As the Third Circuit explained, "'applicable law' must be the FSA, not the 1986 Act, because Congress sought to bring the Guidelines in conformity with the 18:1 ratio . . . ." *U.S. v. Dixon*, 648 F.3d 195, 200 (3d Cir. 2011). By directing the Sentencing Commission to issue prompt emergency guideline amendments implementing the new 18:1 ratio, Congress "evince[d] an intent to apply the FSA to sentences given as of its effective date." *Id.* at 201.

Section 10 of the FSA further confirms Congress's intent. Section 10 requires the Sentencing Commission to "study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act" not later than five years after the FSA's enactment.[12] But because the relevant statute of limitations for charging cocaine offenses is five years,[13] if the FSA did not to apply to conduct prior to its passage, many defendants over the next five years would be sentenced under pre-FSA mandatory minimums. The illogical result, then, would be that the Sentencing Commission would be unable to compile a meaningful report requested by Congress within five years on the FSA's impact on federal sentences. As the Third Circuit has observed, if district courts continue to apply the old 100:1 ratio to all pre-FSA conduct, the report will be "incomplete, at best, and incomprehensible, at worst" because the FSA would "not yet be[ ] uniformly applied until after the report was due." *Dixon*, 648 F.3d at 202 (internal quotation marks omitted). In short, the only way the five-year report would be of any use to Congress is if Congress intended the FSA to apply to all sentences after its enactment.

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[9] Pub. L. No. 111-220, 124 Stat. 2372.

[10] *Id.* at § 8.

[11] *Id.*

Despite this uniform evidence of legislative intent, apparent in both the text and legislative history of the FSA, the Seventh Circuit held that Petitioners should be sentenced under the repudiated 100:1 ratio. The Seventh Circuit reasoned that the general federal savings statute, 1 U.S.C. § 109, prevents the FSA from applying to people whose offense conduct predates the FSA—even if they are sentenced after the FSA's passage. Section 109, which Congress initially passed in 1871 and has reenacted and recodified several times since, provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act so shall expressly provide . . . ." According to the Seventh Circuit, Congress did not "expressly provide" that the FSA applies to people like Petitioners Hill and Dorsey whose conduct predated the new law. The Seventh Circuit's error was in focusing on the language of § 109 rather than the language of the FSA. In so doing, it ignored the axiomatic constitutional principle that one legislature "'cannot abridge the powers of a succeeding legislature.'" *Lockhart v. U.S.*, 546 U.S. 142, 147 (2005) (Scalia, J. concurring) (quoting *Fletcher v. Peck*, 6 Cranch 87, 135 (1810)). "Among the powers of a legislature that a prior legislature cannot abridge is, of course, the power to make its will known in *whatever fashion it deems appropriate*." *Id.* at 148 (emphasis added). This Court has therefore held that § 109 "cannot justify a disregard of the will of Congress as manifested, either expressly *or by necessary implication*, in a subsequent enactment." *Great Northern Ry. Co. v. U.S.*, 208 U.S. 452, 465 (1908) (emphasis added).

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[12] *Id.* at § 10.

[13] *See* 18 U.S.C. § 3282(a) (2006).

The Seventh Circuit disregarded this Court's guidance when it held that absent an express provision, Congress could not have intended the FSA to apply to defendants like Petitioners. Under *Lockhart*, the FSA's text and history provide the "necessary implication" that Congress intended the FSA to apply to all sentences after its enactment. Moreover, to the extent that the Court perceives any ambiguity in the FSA, insofar as its intended applicability is concerned, the "rule of lenity" requires the Court to "resolve the ambiguity in [Petitioner Hill and Dorsey's] favor." *U.S. v.*

Granderson, 511 U.S. 39, 54 (1994). *See* Part IV, *infra*. For the foregoing reasons, *amici* join Petitioners and the United States in urging the Court to reverse the Seventh Circuit's decisions upholding Petitioners' sentences under the discriminatory and empirically bereft 100:1 ratio.[14]

II. Congress Created The 100:1 Ratio In Response To A Media Frenzy And Without Any Evidentiary Basis.

Crack cocaine began to appear in urban areas like New York, Miami, and Los Angeles between 1984 and 1985. By 1986, crack was widely available in large U.S. cities and relatively inexpensive. Upon entering the mainstream drug culture, crack "immediately absorbed the media's attention. . . . [A]ccounts of crack-user horror stories appeared daily on every major channel and in every major newspaper." *U.S. v. Clary*, 846 F. Supp. 768, 783 (E.D. Mo. 1994) (footnotes omitted) *rev'd*, 34 F.3d 709 (8th Cir. 1994)). The late Judge Clyde S. Cahill of the Eastern District of Missouri recounted that "[i]mages of young black men daily saturated the screens of our televisions. These distorted images branded onto the public mind and the minds of legislators that young black men were *solely* responsible for the drug crisis in America. The media created a stereotype of a crack dealer as a young black male, unemployed, gang affiliated, gun toting, and a menace to society." *Id.* Indeed, "[b]etween 1985 and 1986, over 400 reports had been broadcast by the networks." *Id.*

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[14] The Court recently held in *Reynolds v. U.S.*, No. 10-6549, slip op. at 6 (Jan. 23, 2012), that the federal Sex Offender Registration and Notification Act ("SORNA"), 120 Stat. 590, 42 U.S.C. §16901 *et seq.* (2006), does not require offenders convicted before the Act became law "to register before the Attorney General validly specifies that the Act's registration provisions apply to them." *Reynolds* is distinguishable from the present cases. First, the text of SORNA delegated to the Attorney General the "authority to specify the applicability of the requirements . . . to sex offenders convicted before the enactment of this chapter." 42 U.S.C. § 16913(d). In addition, when Congress passed SORNA, it acted against a patchwork quilt of conflicting state rules and it explicitly included a grace period providing the States with at least three years to bring their systems into compliance with federal standards. *Reynolds*, slip op. at 7; 42 U.S.C. §16924. There is no comparable evidence in the FSA or the circumstances surrounding its passage indicating that Congress did not intend the FSA to be immediately effective.

In June 1986, the nation's simmering fear of crack reached a tragic crescendo. On June 17, 1986, the defending NBA champion Boston Celtics selected African American college basketball star Len Bias as the second overall pick in the NBA Draft. Two days later, Bias died of a drug overdose. His death sparked a national media frenzy largely precipitated by a mistaken assumption that his death had been caused by crack cocaine.[15] In fact, Bias died of a powder cocaine overdose,[16] but the inaccurate reports identifying crack as the cause of death, combined with the public's already potent association between crack and African Americans, created an irrepressible momentum against this new form of cocaine.

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[15] Marc Mauer, *The Disparity on Crack-Cocaine Sentencing*, Boston Globe, July 5, 2006, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2006/07/05/the_disparity_on_crack_cocaine_sentencing/.

[16] U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 123 (1995) (issued after a review of cocaine penalties as directed by Pub. L. No. 103-322, § 280006, 108 Stat. 1796) [hereinafter 1995 USSC REPORT].

In the aftermath of Bias's death and with midterm elections quickly approaching, Congress set aside the regular legislative process[17] and expedited consideration of the Anti-Drug Abuse Act of 1986. At the time, the late Senator Charles Mathias (a Republican from Bias's home state of Maryland) lamented that the bill "did not emerge from the crucible of the committee process, tempered by the heat of debate. . . . Many of the provisions of the bill have never been subjected to committee review."[18] Reflecting on this history, Judge Myron H. Bright of the Eighth Circuit explained that "[t]he political climate surrounding the enactment of the [Anti-Drug Abuse Act of 1986] provides the first glimpse at how Congress and the Sentencing Commission created a crack cocaine sentencing scheme untethered to the goals of sentencing." *U.S. v. Brewer*, 624 F.3d 900, 911 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part). As a consequence of the Act's expedited schedule, there was no committee report to document Congress's intent in passing the Act or to analyze the legislation. The House of Representatives held few hearings on the enhanced penalties for crack offenders, and the Senate conducted only a single hearing on the 100:1 ratio, which lasted only a few hours.[19] The abbreviated legislative history of the 1986 Act does not provide a single consistently cited rationale for the lopsided crack/powder penalty structure. According to Representative Dan Lungren (R-CA), who helped write the law in 1986, Congress "didn't really have an evidentiary basis for [the 100:1 disparity]."[20]

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[17] 132 Cong. Rec. S13741-01 (daily ed. Sept. 26, 1986) (statement of Sen. Mathias).

[18] *Id.*

[19] William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1253 (1996).

President Reagan signed the bill into law on October 27, 1986.[21] The Act[22] established mandatory minimum sentences for federal drug trafficking crimes and created the 100:1 sentencing disparity between powder and crack cocaine.[23] To punish "major" and "serious" cocaine traffickers,[24] the Act provided that individuals convicted of trafficking crimes involving 500 grams of powder cocaine—which yields between 2,500 and 5,000 doses[25]—must be sentenced to at least five years imprisonment.[26] But the corresponding amount of crack necessary to trigger the Act's same five-year mandatory minimum was just five grams (the weight of two pennies), which yields between 10 and 50 doses.[27] The Act also provided that those individuals convicted of distribution crimes involving 5000 grams of powder cocaine receive at least 10 years' imprisonment,[28] whereas a mere 50 grams of crack triggered the same 10-year mandatory minimum.[29] Two years later, Congress intensified its war against crack cocaine: the Omnibus Anti-Drug Abuse Act of 1988[30] created a five-year mandatory minimum sentence for simple possession[31] of five grams or more of crack cocaine. Meanwhile, the maximum penalty for simple possession of any amount of powder cocaine (as for controlled substances generally) remained a misdemeanor punishable by no more than one year in prison.

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[20] 156 Cong. Rec. H6196-01, *H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).

[21] *See* Congressional Quarterly Almanac, *Congress Clears Massive Anti-Drug Measure*, 99th Cong., 2d Sess., Vol. 42 at 92 (1986) [hereinafter CQ Almanac].

[22] Pub. L. No. 99-570, 100 Stat. 3207.

[23] *See* 1995 USSC REPORT at 116.

[24] *Id.* at 117-18.

[25] U.S. Sentencing Comm'n, Report to Congress: Federal Cocaine Sentencing Policy 63 (2007) [hereinafter 2007 USSC REPORT].

[26] *Id.* at 2-3.

[27] *Id.* at 63.

[28] 1995 USSC REPORT, at 116.

A. Both Scientific And Sociological Evidence Demonstrate That There Was No Justification For The 100:1 Ratio.

Soon after Congress enacted the 100:1 ratio, objective evidence began mounting that the disparity could not be justified. Indeed, as early as 1993, then-Chief Judge Lyle E. Strom of the District of Nebraska wrote that "the evidence is clear that the cocaine molecule is the same whether the drug being used is powder form or in crack form, and is not inherently more dangerous in crack form." *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 *5 (D. Neb. 1993). In 1996, the Journal of American Medical Association (JAMA) published a study concluding that the physiological and psychoactive effects of cocaine are similar regardless of whether it is in the form of powder or crack.[32] In any composition, cocaine is a potent stimulant of the central nervous system, and, as this Court has previously recognized, both powder and crack produce the same types of physiological and psychotropic effects on the human brain. *Kimbrough v. U.S.*, 552 U.S. 85, 94 (2007).[33] Indeed, crack is neither significantly more addictive than powder cocaine nor more immediately addicting.[34] Crack and powder cocaine are simply the same drug prepared differently.[35] The 1996 JAMA study finding similar physiological and psychoactive effects of cocaine regardless of its form[36] concluded that cocaine's propensity for dependence varies by the method of use, amount used, and frequency—*not* by the form of the drug.[37]

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[29] Pursuant to its mandate to ensure that the federal sentencing guidelines are consistent with all federal laws, the U.S. Sentencing Commission in 1987 applied this same 100:1 ratio to the then-mandatory Sentencing Guidelines.

[30] Pub. L. No. 100-690, 102 Stat. 4181 (1988) (codified as amended in scattered sections of U.S.C.).

[31] The 1986 Act's five-year mandatory minimum did not apply to simple possession of crack cocaine.

By the time Congress passed the FSA, the undeniable consensus in the scientific and legal community was that none of Congress's earlier rationales for the disparity were supported by reliable empirical evidence.[38] As the Sentencing

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[32] D. K. Hatsukami & M. W. Fischman, *Crack Cocaine And Cocaine Hydrochloride: Are The Differences Myth Or Reality?*, 276 Journal of Am. Med. Ass'n, No. 19, 1580 (Nov. 1996).

[33] *See also* U.S. Sentencing Comm'n, Report to Congress: Cocaine and Federal Sentencing Policy 17 (2002) [hereinafter 2002 USSC REPORT].

[34] D. K. Hatsukami & M. W. Fischman, at 1580.

[35] Crack is formed by dissolving powder cocaine in water and treating it with an alkali such as baking soda.

[36] D. K. Hatsukami & M. W. Fischman, at 1580.

[37] *Id.*

[38] *U.S. v. Smith*, 359 F. Supp.2d 771, 777 (E.D. Wis. 2005) ("[c]ourts, commentators and the Sentencing Commission have

Commission stated in 2007, "[c]rack cocaine and powder cocaine are both powerful stimulants, and both forms of cocaine cause *identical effects*."[39] In short, there is now widespread recognition that the 1986 Congress, in its haste, created a cocaine sentencing scheme that lacked any rational relationship to reality.

III. The 100:1 Ratio Resulted In Extreme Racial Disparities In Federal Cocaine Sentencing.

The most catastrophic consequence of the senseless 100:1 ratio has been the disparate and discriminatory impact on African Americans. Even though the majority of crack users are white and Hispanic, African Americans comprise the vast majority of those convicted of crack cocaine offenses. For example, in 2010, whites constituted 7.3% and African Americans an astonishing 78.5% of the defendants sentenced under the federal crack cocaine laws.[40] Moreover, despite Congress's intention to punish major and serious cocaine traffickers,[41] the five-year mandatory minimums for offenses involving just five grams of crack—which can yield as little as

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long criticized this disparity, which lacks persuasive penological or scientific justification.").

[39] 2007 USSC REPORT, at 62 (emphasis added).

[40] U.S. Sentencing Comm'n, 2010 Sourcebook of Federal Sentencing Statistics, Table 34 (2010) *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/SBtoc10.htm [hereinafter 2010 Sourcebook of Federal Sentencing Statistics].

[41] *See* 1995 USSC REPORT at 117-18.

10 doses[42]—punished enormous numbers of very low-level offenders.

The enforcement against and prosecution of African Americans for crack cocaine offenses, combined with the 100:1 ratio, has resulted in African Americans serving substantially more time in prison for crack cocaine offenses than defendants for powder cocaine offenses. The average sentence for a crack cocaine offense in 2010 was 111 months, while the average sentence for a powder cocaine offense was 84.9 months.[43] From 1994 to 2003, the average time African American drug offenders served in prison increased by 77%, compared to an increase of 33% for white drug offenders.[44] By 2004, African Americans served virtually as much time in prison for a nonviolent drug offense (58.7 months) as whites did for a violent offense (61.7 months).[45] Before the enactment of federal mandatory minimum sentencing for crack cocaine offenses, the average federal drug sentence for African Americans was 11% higher than for whites; four years later, it was 49% higher.[46] Indeed, in large part due to the crack mandatory minimums, the African American prison population reached staggering proportions.[47]

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[42] 2007 USSC REPORT at 63.

[43] 2010 Sourcebook of Federal Sentencing Statistics, at Figure J.

[44] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 1994, Table 6.11, at 85; Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112.

[45] Bureau of Justice Statistics, Compendium of Federal Justice Statistics, 2003, Table 7.16, at 112.

[46] B.S. Meierhoefer, Federal Judicial Center, *The General Effect of Mandatory Minimum Prison Terms: A Longitudinal Study of Federal Sentences Imposed* 20 (1992), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/geneffmm.pdf/$file/geneffmm.pdf.

Congress's misinformed assumptions that there are inherent differences between two forms of the same drug, when in fact crack and powder cocaine have the same effects, resulted in a system that treated comparable conduct unequally with African Americans bearing the brunt of such stark inequality. Given that a defendant's race was the factor most commonly and obviously correlated with harsher penalties, the 100:1 ratio came to represent the modern torchbearer of racism in our criminal justice system.

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[47] *See* Bureau of Justice Statistics, Prison Inmates at Midyear 2008—Statistical Tables, Table 16, at 17 *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/pim08st.pdf (In 2008 there were approximately 846,000 African American men held in state or federal prison or in local jails.); Justice Policy Institute, *Cellblocks or Classrooms?: The Funding of Higher Education and Corrections and its Impact on African American Men* 10 (2002), *available at* http://www.justicepolicy.org/images/upload/0209_REP_CellblocksClassrooms_BB-AC.pdf (In 2000, there were approximately 791,600 African American men in prisons and jails, and only 603,032 African American men enrolled in higher education); *see also* Craig Haney & Philip Zimbardo, *The Past and Future of U.S. Prison Policy: Twenty-Five Years After the Stanford Prison Experiment*, 53 American Psychologist, No. 7, at 716 (July 1998) (At the beginning of the 1990s, the United States had more African American men between the ages of 20 and 29 in the criminal justice system than in college); Marc Mauer, *Race, Drugs Laws & Criminal Justice, from Symposium: U.S. Drug Laws: The New Jim Crow?*, 10 Temp. Pol. & Civ. Rts. L. Rev. 321, 324 (2001) (One of every 14 African American children has a parent in prison or jail); ACLU et al, *Caught in the Net: The Impact of Drug Policies on Women and Families* 49 (2005) (African American children are nine times more likely than white children to have a parent incarcerated).

A. The Racial Disparities Resulting From The 100:1 Ratio Have Had A Devastating Impact on Individual Lives.

The story of Hamedah Hasan[48] epitomizes the unduly harsh devastation that the 100:1 ratio has wreaked on individuals and their families. When Ms. Hasan was 21 years old, she was in a horribly abusive relationship with a man in Portland, Oregon. This man repeatedly cursed at, slapped, punched and kicked Ms. Hasan. Eventually, Ms. Hasan, the mother of two young children, fled to live with a cousin in Omaha, Nebraska, where she found sanctuary—a safe place to live hundreds of miles from her abuser.

Unfortunately, Ms. Hasan's cousin dealt crack cocaine. With few resources, and indebted to her cousin for helping her escape her abusive relationship, Ms. Hasan agreed to run various errands and transfer some money in connection with her cousin's drug trafficking. Knowing this was not a place for her two young daughters, Ms. Hasan found the strength to move back to Portland to get away from the drug operation, to create a better life for her daughters, and to earn an honest living.

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[48] Letter from Hamedah Hasan to President Barack Obama (Feb. 2010) *available at* http://www.dearmrpresidentyesyoucan.org/2010.02%20HH%20personal%20Commutation%20Letter%20to%20President.pdf; *see also* ACLU Profile from the War on Drugs: Hamedah Hasan (Jun. 15, 2011) *available at* *http://www.aclu.org/blog/criminal-law-reform/profile-war-drugs-hamedah-hasan.*

However, Ms. Hasan was indicted and convicted of conspiracy to distribute crack cocaine during her time in Omaha. Despite her previously clean record, her sentencing judge found his hands tied by a combination of mandatory minimums for crack cocaine and the then-mandatory sentencing guidelines. *U.S. v. McMurray*, 833 F. Supp. 1454, 1485 (D. Neb. 1993) ("For whatever value it may have, it is my strongly felt opinion that . . . [Ms. Hasan] ought [not] to spend the rest of [her] days in prison. . . . Since my disagreement with these sentences is with many of the normative values underlying them, I am justified only in voicing that disagreement."). Ms. Hasan received a life sentence, which was later reduced to 27 years. Had she been convicted of an offense involving powder cocaine, she would have returned to her family years ago.[49] In a letter she wrote to President Obama in 2010 seeking clemency, Ms. Hasan explained that during her more than 17 years of incarceration, she had "taken long, hard looks at [her]self. [She has] done everything within [her] power to redeem [her]self for [her] past transgressions by learning and demonstrating what it means to be a community asset versus a liability."[50] Ms. Hasan's story is not unique. She is one of many who have suffered under the unjustified 100:1 ratio, and her story demonstrates the urgent need to end the imposition of sentences under that fundamentally unfair scheme.

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[49] Because the U.S. Sentencing Commission's FSA Guideline Amendments are fully retroactive, Ms. Hasan was able to apply for a reduction in her sentence on November 1, 2011.

[50] Letter from Hamedah Hasan to President Barack Obama (Feb. 2010).

B. The United States Sentencing Commission Has Recognized The Discriminatory Impact Of The 100:1 Ratio Since 1995 And Urged Its Repeal.

The Sentencing Commission, a bipartisan agency within the judicial branch, recognized the crack/powder disparity's distressing discriminatory impact beginning in 1995. The Commission reported to Congress that the "100-to-1 crack cocaine to powder cocaine quantity ratio is a primary cause of the growing disparity between sentences for Black and White federal defendants."[51] Based largely on these discriminatory consequences, the Commission told Congress on four occasions that there was no basis for the 100:1 ratio. In its 1995, 1997, 2002, and 2007 reports to Congress, the Commission recommended increasing the crack quantity thresholds necessary to trigger mandatory minimum sentences.

On February 28, 1995, the Commission unanimously recommended that changes be made to the cocaine sentencing structure, including a reduction in the 100:1 ratio.[52] On May 1, 1995, the Commission submitted to Congress proposed legislation and amendments to its sentencing guidelines which would have equalized the penalties for crack and powder cocaine possession and distribution at the level of powder cocaine, and provided sentencing enhancements for violence or other harms.[53] The Commission "acknowledged that its crack guidelines bear no meaningful relationship to the culpability of defendants sentenced pursuant to them. . . .[T]he Commission has never before made such an extraordinary mea culpa acknowledging the enormous unfairness of one of its guidelines." *U.S. v. Anderson*, 82 F.3d 436, 449-50 (D.C. Cir. 1996) (Wald, J., dissenting) (footnotes omitted).

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[51] 1995 USSC REPORT, at 154.

[52] U.S. Sentencing Comm'n, Special Report to the Congress: Cocaine and Federal Sentencing Policy 1 (1997) [hereinafter 1997 USSC REPORT].

Later that year, Congress and the President rejected the Commission's recommended guideline amendment equalizing the powder and crack penalties.[54] In addition, Congress explicitly directed the Commission to provide new recommendations in which "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine."[55]

In April 1997, the Commission issued a second report urging the reduction of the 100:1 ratio, which again highlighted the ratio's discriminatory impact. Indeed, the report's very first paragraph states that "[c]ritics [of the cocaine sentencing disparity] have focused on the differences in federal penalty levels between the two principal forms of cocaine . . . and on the disproportionate impact the more severe crack penalties have had on African-American defendants."[56] The Commission stated that it was "firmly and unanimously in agreement that the current penalty differential for federal powder and crack cocaine cases should be reduced by changing the quantity levels that trigger mandatory minimum penalties for both powder and crack cocaine."[57]

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[53] *See* Amendments to the Sentencing Guidelines for the United States Courts, 60 Fed. Reg. 25074, amend. No. 5 (proposed May 10, 1995).

[54] Act of Oct. 30, 1995, Pub. L. No 104-38, § 1, 109 Stat. 334 (1995) (an Act to disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences). This marked the first time in the guidelines' history that Congress and the President rejected a guideline amendment that the Commission had approved. *Anderson*, 82 F.3d at 449-50 (Wald, J., dissenting).

[55] § 2(a)(1)(A), 109 Stat. at 334.

In 2002, the Commission examined the disparity for a third time. The Commission held hearings with a wide range of experts who overwhelmingly concluded that there is no valid scientific or medical distinction between powder and crack cocaine.[58] After the 2002 hearings, the Commission issued a new report on crack and powder cocaine disparities and once again found that the 100:1 ratio is unjustified.[59] Specifically, the Commission found that the crack penalties: 1) exaggerated the relative harmfulness of crack cocaine; 2) swept too broadly and applied most often to lower level offenders; 3) overstated the seriousness of most crack cocaine offenses and failed to provide adequate proportionality; and 4) mostly affected minorities.[60] Accordingly, the Commission recommended that Congress increase the five-year mandatory minimum threshold quantity for crack cocaine offenses.[61]

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[56] 1997 USSC REPORT, at 1.

[57] 1997 USSC REPORT, at 2.

[58] 2002 USSC REPORT, at Appendix E, E-1–E-6.

[59] *Id.* at v.

[60] *Id.* at v-viii.

[61] *Id.* at 104-06.

In 2007, the Commission reiterated its objections to federal cocaine sentencing policy and urged Congress to act. The Commission stated that "[f]ederal cocaine sentencing policy, insofar as it provides substantially heightened penalties for crack cocaine offenses, continues to come under almost *universal criticism* from representatives of the Judiciary, criminal justice practitioners, academics, and community interest groups, and inaction in this area is of increasing concern to many, including the Commission."[62] In this report, the Commission repeated its four findings from the 2002 report, including that the "severity of crack cocaine penalties mostly impacts minorities."[63] Thus, while it was the 111th Congress that finally reduced the 100:1 ratio, the Commission had implored every Congress since the 104th to reform the discriminatory law.

C. Federal Judges Have Condemned The Racially Discriminatory 100:1 Ratio For Decades.

The Commission's zealous opposition to the 100:1 ratio has been matched by that of federal district and circuit court judges across the country from all ideological backgrounds. Recognizing that the 100:1 ratio resulted in disturbing racial disparities, numerous federal judges expressed their distress and frustration over this discredited policy for many years. The judicial outcry over the 100:1 ratio appears to be unprecedented in our history—perhaps no other single sentencing policy has inspired such harsh condemnation by so many federal judges. In 1997, 27 federal judges, all of whom had previously served as U.S. Attorneys, sent a letter to the U.S. Senate and House Judiciary Committees stating that "[i]t is our strongly held view that the" 100:1 ratio "can not be justified and results in sentences that are unjust and do not serve society's interest."[64]

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[62] 2007 USSC REPORT, at 2 (emphasis added).

[63] *Id.* at 8.

Judge Myron H. Bright of the Eighth Circuit has been condemning the 100:1 ratio since 1992, when he wrote that "[g]iven the precedents of this court, I find myself obliged to concur in that holding. . . . I write separately to note the racial injustice flowing from this policy." *U.S. v. Williams*, 982 F.2d 1209, 1214 (8th Cir. 1992) (Bright, J., concurring). By 2010, Judge Bright insisted that "[t]he disproportionate impact of the crack cocaine guidelines on minorities should concern every federal judge." *U.S. v. Brewer*, 624 F.3d 900, 913 n. 14 (8th Cir. 2010) (Bright, J., concurring in part and dissenting in part).

Another early and passionate critic of the ratio was Judge Nathaniel R. Jones of the Sixth Circuit. In 1996, Judge Jones pointedly noted that "the African-American community has borne the brunt of enforcement of the 100:1 ratio." *U.S. v. Smith*, 73 F.3d 1414, 1418 (6th Cir. 1996) (Jones, J., concurring). Judge Jones urged his colleagues to revisit the constitutionality of the ratio, arguing that "[t]he longer the policies exist, the greater the risk that we send a message to the public that the lives of white criminals are considered by the U.S. justice system to be at least 100 times more valuable and worthy of preservation than those of black criminals." *Id.* at 1422 (internal quotation marks omitted).

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[64] Letter from Judge John S. Martin, Jr. to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), *reprinted in* 10 FED. SENT'G RPTR. No. 4, at 194 (Jan./Feb. 1998).

Judges of the Second, Seventh, and Ninth Circuits echoed Judge Jones' condemnation of the ratio. In 1995, Judge Guido Calabresi of the Second Circuit asserted that the "disproportionate impact that the 100–to–1 crack/cocaine sentencing ratio has on members of minority groups is deeply troubling. . . . the statistical evidence demonstrating the discriminatory impact of the current sentencing differential is now irresistible." *U.S. v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring) (internal quotation marks omitted). The late Judge Robert Boochever of the Ninth Circuit explained that "[a]lthough I find the result in this case to be shocking, in that the punishment for the crack cocaine offense is the same as the punishment that would have been imposed for a comparable offense involving 100 times as much powder cocaine, and the evidence indicates that 92% of federal prosecutions for crack cocaine, which require the enormously higher terms of imprisonment, involve African-Americans, I am compelled to concur." *U.S. v. Dumas*, 64 F.3d 1427, 1432 (9th Cir. 1995) (Boochever, J., concurring). In 1996, Judge Richard D. Cudahy of the Seventh Circuit wrote that "the extraordinary impact of the 100:1 ratio will provoke examination and reexamination however many efforts are made to lay the matter to rest." *U.S. v. Reddrick*, 90 F.3d 1276, 1284 (7th Cir. 1996) (Cudahy, J., concurring).

Starting in the early 1990s, district court judges sitting at the front lines of federal cocaine sentencing likewise renounced the ratio's discriminatory impact. In 1993, Judge Spencer Letts of the Central District of California protested, "I, for one, do not understand how it came to be that the courts of this nation, which stood for centuries as the defenders of the rights of minorities against abuse at the hands of the majority, have so far abdicated their function that this defendant must serve a ten year sentence. . . In upholding mandatory minimum sentences, the courts have instituted racial disparity in sentencing." *U.S. v. Patillo*, 817 F. Supp. 839, 843, n.6 (C.D. Cal. 1993). The same year, then-Chief Judge Lyle E. Strom of the District of Nebraska explained that "[a] by-product of this inordinate disparity is that members of the African American race are being treated unfairly in receiving substantially longer sentences than caucasian[s]." *U.S. v. Majied*, No. 8:CR91-00038(02), 1993 WL 315987 *5 (D. Neb. 1993).

When Judge Richard G. Kopf of the District of Nebraska sentenced Hamedah Hasan in 1993, he lamented "the nearly overwhelming statistical evidence that blacks are prosecuted much more frequently and 'disproportionately' for 'crack' violations than whites and that blacks are consequently much more likely than whites to be subjected to harsh sentences under the 'crack' guidelines." *U.S. v. McMurray*, 833 F. Supp. 1454, 1461 (D. Neb. 1993). Two years later, he wrote that "it is now beyond doubt that the 100–to–1 ratio creates unnecessary and unintended sentencing disparity . . . . For example, there is the very troubling problem of unintentional but nevertheless unwarranted disparity insofar as ethnic or racial minorities are concerned." *U.S. v. Thompson*, 905 F. Supp. 676, 679 (D. Neb. 1995).

In 1994, the late Judge Clyde S. Cahill Jr. of the Eastern District of Missouri held that the 100:1 ratio violated the Equal Protection rights of an African American crack defendant. *U.S. v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994) *rev'd*, 34 F.3d 709. (8th Cir. 1994). Judge Cahill asserted "that this one provision, the crack statute, has been directly responsible for incarcerating nearly an entire generation of young black American men for very long periods, usually during the most productive time of their lives." 846 F. Supp. at 770. He found the "disparity . . . so significantly disproportional that it shocks the conscience of the Court and invokes examination." *Id.*

Ten years later, district court judges continued to criticize the disparity. In 2005, Judge Lynn S. Adelman of the Eastern District of Wisconsin called the ratio "notorious," and summarized that "[c]ourts, commentators and the Sentencing Commission have long criticized this disparity, which lacks persuasive penological or scientific justification, and creates a racially disparate impact." *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005). Judge William E. Smith of the District of Rhode Island recounted that "approximately 85% of the offenders sentenced for crack cocaine violations are black . . . and that this leads to, at the very least, a perception that the crack/powder disparity is racially-motivated." *U.S. v. Perry*, 389 F. Supp. 2d 278, 302 (D.R.I. 2005). Judge Shira A. Scheindlin of the Southern District of New York wrote that "the heavy crack cocaine sentences .

. . are disproportionately imposed on young black males." *U.S. v. Fisher*, 451 F. Supp. 2d 553, 561 (S.D.N.Y. 2005) (footnote omitted) (vacated and remanded *U.S. v. Thompson*, 528 F.3d 110 (2d Cir. 2008)).

In 2006, Judge Gregory A. Presnell of the Middle District of Florida explained that "the crack/powder disparity results in a disparate impact along racial lines, with black offenders suffering significantly harsher penalties." *U.S. v. Hamilton*, 428 F. Supp. 2d 1253, 1258 (M.D. Fla. 2006) (footnote omitted). In 2009, Judge Joan B. Gottschall of the Northern District of Illinois departed from the Sentencing Guidelines' ratio, citing "ample evidence that the crack-to-powder ratio is unjustifiable and unjust, is racially discriminatory in impact and is not proportionate." *U.S. v. Edwards*, No. 04-CR-1090-5, 2009 WL 424464,*3 (N.D. Ill. 2009). Judge Kimba M. Wood of the Southern District of New York wrote that the ratio "fosters disrespect for the criminal justice system because of its racial impact." *U.S. v. Monroe*, No. 05-CR-1042-01, 2009 WL 1448959, *1 n.1 (S.D. N.Y. 2009). Similarly, Judge Mark W. Bennett of the Northern District of Iowa argued in 2009 that the ratio's "disproportionate impact on black offenders fosters disrespect for and lack of confidence in the criminal justice system." *U.S. v. Gully*, 619 F. Supp. 2d 633, 641 (N.D. Iowa 2009).

Circuit Court judges also continued to criticize the discriminatory ratio. In 2006, Judge Rosemary Barkett of the Eleventh Circuit wrote that "[t]he ratio has been subject to widespread criticism almost since its inception. . . . This differential in sentencing creates an unwarranted disparity that has been correlated with racial disparities and that undermines the public confidence in the criminal justice system." *U.S. v. Williams*, 472 F.3d 835, 846 n.4 (11th Cir. 2006) (dissent from denial of rehearing en banc). In 2009, Judges Carlos F. Lucero, Timothy M. Tymkovich, and Jerome A. Holmes of the Tenth Circuit, in a per curiam order, noted "that the implementation of the 100-to-1 quantity ratio more greatly impacts African-Americans across the justice system as a whole." *U.S. v. Lasley*, 331 Fed. Appx. 600, 602 (10th Cir. 2009) (per curiam). Last year, Judge Andre M. Davis of the Fourth Circuit concluded that the "ballooning of the percentage of blacks incarcerated over the past 25 years directly corresponds with the disparate treatment of crack and powder cocaine." *U.S. v. Gregg*, 435 Fed. Appx. 209, 221 (4th Cir. 2011) (Davis, J., concurring).

This Court, too, has grappled with the 100:1 ratio and its discriminatory impact. As early as 1996, Justice Stevens characterized as "undisputed" the fact "that the brunt of the elevated federal penalties falls heavily on blacks." *U.S. v. Armstrong*, 517 U.S. 456, 479 (1996) (Stevens, J., dissenting). In *Kimbrough v. U.S.*, 552 U.S. 85 (2007), the Court reviewed the history of the 100:1 ratio and noted that the Commission had found that the disparity in cocaine sentencing "fosters disrespect for and lack of confidence in the criminal justice system because of a widely-held perception that it promotes unwarranted disparity based on race." *Id.* at 98 (internal quotation marks omitted). The Court acknowledged that the Commission had long objected to the ratio in part because "[a]pproximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio are imposed primarily upon black offenders." *Id.* (internal quotation marks omitted).

D. Congress Understood The Discriminatory Consequences Of The 100:1 Ratio When It Passed The FSA And Explicitly Sought To Redress This Longstanding Injustice.

The landscape within which Congress passed the FSA was dominated by resounding criticism of a policy that had no "penological or scientific justification," *U.S. v. Smith*, 359 F. Supp. 2d 771, 777 (E.D. Wis. 2005), and had become "one of the most notorious symbols of racial discrimination in the modern criminal justice system."[65]

The successful legislative effort followed an Executive call to action. The Obama administration repeatedly and publicly condemned the 100:1 ratio, citing its discriminatory effects. Attorney General Eric Holder asserted that "[i]t is the view of this Administration that the 100-to-1 crack-powder sentencing ratio is simply wrong. It is plainly unjust to hand down wildly disparate prison sentences for materially similar crimes. It is unjust to have a sentencing disparity that disproportionately and illogically affects some racial groups."[66] Similarly,

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[65] 156 Cong. Rec. S1680-02, *S1683 (daily ed. Mar. 17, 2010) (statement of Sen. Leahy) (quoting letter to the Senate Judiciary Committee from John Payton, the president of the NAACP Legal Defense Fund).

[66] Attorney General Eric Holder, Remarks as Prepared for Delivery at the D.C. Court of Appeals Judicial Conference (June 19, 2009) (available at www.usdoj.gov/ag/speeches/2009/ag-speech-090619.html); *see also* Attorney General Eric Holder,

Assistant Attorney General Lanny Breuer recounted that "Sentencing Commission data confirms that in 2006, 82 percent of individuals convicted of federal crack cocaine offenses were African American, while just 9 percent were White. . . . The impact of the [crack/powder ratio] has fueled the belief across the country that federal cocaine laws are unjust."[67] Having heard from the Obama Administration, the Sentencing Commission, and numerous members of the federal judiciary that the 100:1 ratio was discriminatory, a bipartisan coalition of the 111th Congress sought to correct the injustice with the FSA: "There is a bipartisan consensus that current cocaine sentencing laws are unjust. Now Democrats and Republicans have come together to address the issue in a bipartisan way. . . . [T]he Senate Judiciary

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Remarks at the National Black Prosecutors Association's Profiles in Courage Luncheon (July 22, 2009) (available at http://www.justice.gov/ag/speeches/2009/ag-speech-0907221.html) ("I have seen first-hand the effect that disparities in drug sentences have had on our communities. In my career as a prosecutor and as a judge, I saw too often the cost borne by the community when promising, capable young people sacrificed years of their futures for *non*-violent offenses."); Attorney General Eric Holder, Testimony before the United States House of Representatives Committee on the Judiciary (May 14, 2009) (available at http:www.usdoj.gov/ag/testimony/2009/ag-testimony-090514.html); Attorney General Eric Holder, Remarks at Charles Hamilton Houston Institute for Race and Justice and Congressional Black Caucus Symposium (June 24, 2009) (available at http://www.justice.gov/ag/speeches/2009/ag-speech-0906241.html).

[67] Assistant Attorney General Lanny Breuer, Statement before the United States Senate Committee on the Judiciary Subcommittee on Crime and Drugs (Apr. 29, 2009) (available at http://www.judiciary.senate.gov/pdf/09-04 29BreuerTestimony.pdf).

Committee reported the [FSA] by a unanimous 19-to-0 vote."[68]

On the day the FSA passed in the Senate, Senator Dick Durbin explained that "the net result of" the crack/powder disparity "was that the heavy sentencing we enacted . . . took its toll primarily in the African-American community. . . . It was the same cocaine, though in a different form, and [African Americans] were being singled out for much more severe and heavy sentences."[69] Senator Durbin later said that "[t]his disparity was one of the most significant causes of unequal incarceration rates between African Americans and Caucasians. The following statistic is chilling: In this country, African Americans are incarcerated at approximately six times the rate of Caucasians."[70]

Similarly, on the day the FSA passed in the House of Representatives, Representative Dan Lungren (R-CA), who "helped to write the Drug Control Act of 1986," told his colleagues that "one of the sad ironies . . . is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue."[71] Representative Henry C. Johnson, Jr. (D-GA) urged his colleagues to vote for the FSA because "[t]here is absolutely no justification for this racial disparity in federal cocaine sentencing policy."[72] Speaking in support of the FSA, Representative Sheila Jackson Lee (D-TX) stated, "[i]t is time for us to realize that the only real difference between these two substances is that a disproportionate number of the races flock to one or the other."[73] Representative Steny Hoyer (D-MD) asserted that "[i]t has long been clear that 100-to-1 disparity has had a racial dimension . . . helping to fill our prisons with African Americans disproportionately put behind bars for longer. The 100-to-1 disparity is counterproductive and unjust."[74]

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[68] 156 Cong. Rec. S1680-02, *S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin).

[69] *Id.* at *S1680-81.

[70] 157 Cong. Rec. S4209-02, **S4209-10* (daily ed. June 29, 2011) (statement of Sen. Durbin).

[71] 156 Cong. Rec. H6196-01, *H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren).

There can be little doubt that Congress overwhelmingly voted for the FSA in order to redress the profound racial disparities that the 100:1 ratio created. The legislative history confirms that "[i]t is the instinctive distaste against men and women, but mainly African-American men . . . languishing in prison for committing crimes of crack rather than powder cocaine, that led Congress to pass the Fair Sentencing Act." *U.S. v. Holcomb*, 657 F.3d 445, 460-61 (7th Cir. 2011) (Williams, J., dissenting from denial of rehearing en banc).

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[72] 156 Cong. Rec. E1498-02, *E1498-99 (daily ed. July 28, 2010) (statement of Rep. Johnson).

[73] 156 Cong. Rec. H6196-01, *H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee).

[74] 156 Cong. Rec. H6196-01, *H6203 (daily ed. July 28, 2010) (statement of Rep. Hoyer); *see also* 156 Cong. Rec. H6196-01, *H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) ("Equally troubling is the enormous growth in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans."); 156 Cong. Rec. H6196-01, *H6197 (daily ed. July 28, 2010) (statement of Rep. Scott) ("This disparity is particularly egregious when you consider that the Sentencing Commission has concluded that there is no pharmacological difference between the two forms of cocaine, and that 80 percent of the crack defendants are black, whereas only 30 percent of the powder cocaine defendants are black.").

IV. This Court's Presumption That Congress Seeks To Avoid Unnecessarily Vindictive Punishments, Along With The Rule Of Lenity, Weigh In Favor Of Applying The New Crack/Powder Ratio To Petitioners.

The principle underlying this Court's holding in *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964), weighs in Petitioners' favor. *Hamm* held that state trespass convictions arising from the petitioners' participation in lunch counter sit-ins had to be vacated as a result of the subsequent Civil Rights Act. *Id.* at 307, 317. The principle reflected in that holding "takes the . . . form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." *Id.* at 313. The Court directed that this "general principle . . . is to be read wherever applicable as part of the background against which Congress acts." *Id.* at 313-14.

The *Hamm* principle is applicable here, where Congress acted against the background of unprecedented opposition to a sentencing policy widely acknowledged to have discriminatory effects. As a result, an intention must be imputed to Congress that the old crack/powder ratio, which "no longer further[s] any legislative purpose," *id.* at 313, should not be imposed on any defendant after the FSA's enactment. The purpose of the FSA, like the Civil Rights Act, "was to obliterate the effect of a distressing chapter in our history," *id.* at 315, during which African American citizens of this country were effectively subject to legal discrimination based on their race. Even though the FSA did not "substitute[ ] a right for a crime," *id.* at 314, this Court's reasoning in *Hamm* applies in the extraordinary context of the new federal cocaine sentencing scheme. When Congress replaces a discriminatory legal regime, there is no justification for gradually tearing down the old regime—rather, the old law must immediately yield to the new law. It would be "unnecessarily vindictive," *id.* at 313, to sentence Petitioners Hill and Dorsey under a 100:1 ratio that science has rejected as unsound and Congress has repudiated as unfair.

Amici perceive no ambiguity in Congress's intent to remedy the racially disparate consequences of the 100:1 ratio when it passed the FSA. However, to the extent that the Court is not persuaded that the "text, structure, and history" of the FSA "unambiguously" establishes this intent, the "rule of lenity" requires the Court to "resolve the ambiguity in [Petitioner Hill and Dorsey's] favor." *U.S. v. Granderson*, 511 U.S. 39, 54 (1994). As this Court recently reiterated, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. U.S.*, 561 U.S. ---, 130 S. Ct. 2896, 2932 (2010) (internal quotation marks omitted). This rule favors applying the FSA to all sentences after its enactment.

To deny Petitioners the benefit of the FSA's less discriminatory ratio would undermine the Act's self-proclaimed objective "[t]o restore fairness to Federal cocaine sentencing."[75] Congress's pressing concerns with racial equality and proportionality in sentencing apply with equal force to conduct committed prior to the passage of the FSA as to conduct committed afterwards. It would be inconsistent with Congress's purpose to end the legacy of inequitable cocaine sentencing for this Court to allow the defunct and flawed 100:1 ratio to govern any sentence imposed after the FSA's enactment.

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[75] Pub. L. No. 111-220, 124 Stat. 2372 (2010).

CONCLUSION

For the reasons stated above, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

STATEMENTS OF INTEREST

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The ACLU of Illinois is a statewide affiliate of the national ACLU. Since its founding more than 90 years ago, the ACLU has appeared before this Court in numerous cases, both as direct counsel and as *amicus curiae*, including *Kimbrough v. U.S.*, 552 U.S. 85, 94 (2007), which is pertinent to the issue presented in this case.

The Leadership Conference on Civil and Human Rights is a diverse coalition of more than 200 national organizations charged with promoting and protecting the rights of all persons in the United States. The Leadership Conference was founded in 1950 by A. Philip Randolph, head of the Brotherhood of Sleeping Car Porters; Roy Wilkins of the NAACP; and Arnold Aronson, a leader of the National Jewish Community Relations Advisory Council. The Leadership Conference works to build an America that's as good as its ideals, and towards this end, is dedicated to eliminating all forms of discrimination from our criminal justice system. Fairness and equality in the administration of justice is a fundamental civil and human right, but the extreme racial disparities that exist within the criminal justice system deny this right to the most vulnerable segments of society. Since the passage of the Anti-Drug Abuse Act of 1986, courts, legislators, and the United States Sentencing Commission have repeatedly noted the inequity in sentencing for crack cocaine offenders, who receive harsher and longer prison terms for the same conduct as powder cocaine offenders, which disproportionately affects African Americans. Thus Congress passed the Fair Sentencing Act to remedy this stark disparity in sentencing, noting its intent "to restore fairness to Federal cocaine sentencing." The Leadership Conference supports application of the Fair Sentencing Act to all defendants whose conduct predates the enactment of the Fair Sentencing Act, but were sentenced after.

The National Association for the Advancement of Colored People (NAACP) is a non-profit membership corporation incorporated in the State of New York in 1909. The NAACP is the nation's oldest and largest civil rights organization. The mission of the NAACP is to ensure the political, educational, social and economic equality of all persons and to eliminate racial hatred and racial discrimination. The NAACP has been at the forefront of the struggle to end racial disparities in the criminal justice system.

The Sentencing Project is a national non-profit organization established in 1986 to engage in public policy research and education on criminal justice reform. The Sentencing Project has produced a broad range of scholarship assessing the effects of federal crack cocaine policy, and members of its staff have been invited to present testimony before Congress, the United States Sentencing Commission, and professional audiences on the topic. Because of its particular expertise and interest in this issue, The Sentencing Project also filed a brief *amici curiae* (jointly with the Center for the Study of Race and

Law at the University of Virginia School of Law) specifically addressing the crack-powder cocaine disparity in *Kimbrough v. United States* (2007).

Families Against Mandatory Minimums (FAMM) is a national nonprofit, nonpartisan organization. FAMM's mission is to promote fair and proportionate sentencing policies and to challenge inflexible and excessive penalties required by mandatory sentencing laws. By mobilizing thousands of individuals whose lives have been affected by unjust sentences, FAMM illuminates the human face of sentencing as it advocates for state and federal sentencing reform.

FAMM, whose membership includes many prisoners previously sentenced under the now repudiated crack cocaine sentencing structure, worked since the early 1990s to reform the law. Today, FAMM membership includes dozens of individuals sentenced since the Fair Sentencing Act was enacted to pre-FSA mandatory minimum sentences. They include Mario Anthony Herrera, sentenced at the age of 19 in the Southern District of Iowa on September 24, 2010 for his role in distributing 13.4 grams of crack cocaine. The judge departed from the pre-Amendment guideline range of 70-87 months but could not reduce Herrera's sentence further due to the five year mandatory minimum. Herrera suffered significant substance abuse problems as a youth and had a very tough childhood that included absent and incarcerated parents and membership in a youth gang. But, following his release from the state training school, he voluntarily left the gang and engaged in a committed relationship with the mother of his son, whose birth forced him to grow up. Herrera's son was 23 months old when Herrera was incarcerated. If petitioners prevail, Herrera's sentence can be corrected to a just and fair term.

The Open Society Institute is a part of the Open Society Foundations, which work to improve the lives of the world's most vulnerable people and to promote human rights, justice, and accountability. To achieve this mission, the Foundations seek to shape public policies that assure greater fairness in political, legal, and economic systems and safeguard fundamental rights. In the United States, the Open Society Foundations implement a range of initiatives to advance justice, education, public health, and independent media. At the same time, the Foundations build alliances across borders and continents on issues such as corruption and freedom of information. The Foundations place a high priority on protecting and improving the lives of people in marginalized communities. The Washington, D.C. Office of the Open Society Institute supports fair and responsible criminal justice policies in the United States. In furtherance of this aim and our goal of eliminating racial disparities and securing a fair and equitable system of justice, the Washington Office has long worked to heighten public discourse on the unwarranted disparity between crack and powder cocaine sentencing, and has played a pivotal role in raising awareness of the issue before the U.S. Sentencing Commission, the U.S. Congress, and the Executive Branch.

The Drug Policy Alliance ("the Alliance") is the nation's leading advocacy organization dedicated to broadening the public debate over drug use and regulation and to advancing pragmatic drug laws and policies, grounded in fairness, equality, public health and respect for civil and human rights. The Alliance is a non-profit, non-partisan organization with more than 30,000 members and active supporters nationwide. The Alliance has actively taken part in cases in state and federal courts across the country in an effort to reduce the disparate impact of the nation's drug laws and was an active supporter of the Fair Sentencing Act of 2010.

StoptheDrugWar.org is an organization devoted to reform of drug policy through the establishment of new approaches that are not based on criminalization. Since its founding 18 years ago, StoptheDrugWar.org has reached millions of people through educational programs that highlight the harms, injustices and failures of current drug policies, including mandatory and disproportionate sentencing; and through grassroots and coalition advocacy in Congress.

AMICUS
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BRIEF

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AND
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Supreme Court, U.
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Nos. 11-5683 & 11-5721

In the
Supreme Court of the United States

EDWARD DORSEY, SR.,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

COREY A. HILL,
Petitioner,
v.
THE UNITED STATES OF AMERICA,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. CONGRESS ADOPTED THE ADAA CRACK PROVISIONS IN UNDUE HASTE AND WITHOUT EMPIRICAL SUPPORT 4

II. SUBSEQUENT EMPIRICAL DATA CONCLUSIVELY UNDERMINE THE JUSTIFICATIONS FOR THE OLD RATIO 10

- A. The 100-to-1 Penalty Ratio Failed To Prioritize Federal Prosecutions Of Major Cocaine Traffickers 12
- B. Crack Is Not 100 Times More Harmful To Society Than Powder Cocaine 16
- C. Crack Is Not 100 Times More Harmful To An Individual User Than Powder Cocaine 19

III. CORRECTING THE ERRONEOUS POST-FSA SENTENCES WILL NOT BURDEN THE FEDERAL CRIMINAL JUSTICE SYSTEM ... 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

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131 S. Ct. 2225 (2011) 2, 19

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477 N.W.2d 886 (1991) 11

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae the Center on the Administration of Criminal Law, New York University School of Law (the "Center")[2] is dedicated to defining and promoting best practices in the administration of criminal justice through academic research, litigation, and participation in the formation of public policy. The Center's litigation component aims to use its empirical research and experience with criminal justice practices to assist in important criminal justice cases.

Following the enactment of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 ("the ADAA"), federal offenses involving specific quantities of drugs were subject to mandatory minimum sentences. The ADAA created a vast sentencing disparity between crack and powder cocaine, "treat[ing] every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough v. United States*, 552 U.S. 85, 96 (2007). As Petitioners and the United States explain, Congress amended this "100-to-1 ratio" in the Fair

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* represent that they authored this brief in its entirety and that none of the other parties or their counsel, or any person or entity other than *amicus curiae* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties were notified of *amicus curiae*'s intention to file this brief in accordance with Supreme Court Rule 37, and all parties consent to the filing of this brief.

[2] New York University School of Law ("the Law School") is named here solely to identify the Center's affiliation. The views expressed in this brief should not be regarded as the position of the Law School.

Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 ("the FSA") with the express intent to apply the amendment to all pending cases. The Center's brief supports this argument by demonstrating that the 100-to-1 ratio lacked any evidentiary basis at the time Congress enacted it, and that 26 years of subsequent empirical data conclusively refute the purported justifications for that ratio. It would be manifestly unjust, and Congress could not possibly have intended, to apply the old, discredited ratio to *any* defendant.

SUMMARY OF ARGUMENT

Under the ADAA's 100-to-1 ratio, five grams or more of cocaine base (the most common form of which is crack) was "penalized as severely as 100 times that amount" of powder cocaine. *DePierre v. United States*, 131 S. Ct. 2225, 2229 (2011). For example, although 500 grams or more of powder cocaine (cocaine hydrochloride) triggered the ADAA's five-year mandatory minimum, only five grams of crack cocaine triggered the same penalty. 21 U.S.C. § 841(b)(1)(B)(ii) (2006); *id.* § 841(b)(1)(B)(iii). The ADAA's legislative history reflects that Congress rushed to impose this grossly disparate sentencing regime because it wanted to target major drug traffickers, feared that crack caused more violence and other harms to society than powder cocaine, and believed that crack was unusually dangerous and addictive. Yet because the crack phenomenon was still new and poorly understood at the time, Congress had no empirical data or research to support these assumptions, let alone the choice of a 100-to-1 ratio. By all accounts, that figure was plucked from thin air to make a political point that Congress was "serious" about crimes involving crack.

Moreover, in the 26 years following Congress's rush to judgment in enacting the ADAA, a vast amount of research, evidence, and criminal justice experience conclusively undermines the purported justifications for the old ratio. In particular, the data demonstrate that:

- The ADAA's ratio did not lead to increased punishment of major crack traffickers. To the contrary, the ratio, together with the statute's low crack-quantity trigger for mandatory minimums, led to markedly increased prosecutions of small-time street dealers, whose sentences were comparable to or even greater than those of much higher-level distributors of powder cocaine.
- Crack does not impose 100 times more harm upon society than powder cocaine. For example, in the past 15 years, there has been no significant difference between the social harms caused by crack and those caused by powder cocaine. Federal offenses for both types of the drug have been linked to violence in only a modest fraction of cases. Moreover, the ADAA regime has itself caused harm, by promoting a stark racial disparity in conviction and incarceration, and systematically over-punishing low-level defendants.
- Crack is not demonstrably more dangerous to the user than powder cocaine. The two chemicals have equally deleterious health effects and rates of addiction.

In light of this evidence, Congress determined that a substantial reduction of the crack-powder ratio was necessary "[t]o restore fairness to Federal cocaine sentencing." FSA pmbl., 124 Stat. at 2372. Having made that determination, Congress could not have concluded that the 100-to-1 ratio it expressly repudiated could still be imposed on pipeline defendants. Indeed, given the bankrupt justifications for the old ratio, and the pervasive harms and injustice it has caused, it would be manifestly unfair to continue to apply that ratio to *any* defendant.

Finally, the federal criminal justice system's prior experience teaches that a limited application of the FSA to pipeline defendants will present no administrative hardship.

ARGUMENT

I. CONGRESS ADOPTED THE ADAA CRACK PROVISIONS IN UNDUE HASTE AND WITHOUT EMPIRICAL SUPPORT

Congress enacted the mandatory minimum crack provisions without adequate time to properly consider the implications of creating such a wide gulf between the punishment of crack and the punishment of powder cocaine. In fact, the legislative record reveals a breakdown of the deliberative process, leading to the imposition of an arbitrary and unduly punitive 100-to-1 ratio simply to make a political point that Congress was taking the crack problem seriously. Moreover, the legislative record shows that Congress's stated goals for imposing extraordinary penalties upon crack defendants were not supported by any empirical evidence.

1. The ADAA went from initial proposal to enactment in just four months. The first bill was proposed in late June 1986, following media accounts of a rising crack epidemic. David A. Sklansky, Essay, *Cocaine, Race, and Equal Protection*, 47 Stan L. Rev. 1283, 1293-94 (1995). Then, over the Fourth of July recess, constituent outrage flared over the cocaine-related deaths of two sports stars. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 117, 122-23 (1995) ("1995 Report"); *and see, e.g.*, 132 Cong. Rec. 19,249 (1986) (Sen. Leahy) ("The country was shaken recently when cocaine killed two talented young athletes—Len Bias of the University of Maryland and Don Rogers of the Cleveland Browns."); *id.* at 22,660 (Rep. Michel) ("The death of basketball star Len Bias shocked us into action.").[3] Party leadership quickly exerted pressure to pass "comprehensive drug legislation" by fall midterm elections. Sklansky, *supra*, at 1294 n.55. The ADAA was enacted October 27, 1986. 100 Stat. at 3207.

Eric Sterling, then counsel for the House Judiciary Committee, later testified that "the intensity of the climate of legislative haste," including an extraordinary five-week deadline for committee work, caused "[t]he careful deliberative practices of the Congress" to be "set aside." U.S. Sentencing Comm'n, *Public Hearing on Proposed Guideline Amendments* (Mar. 22, 1993) (written testimony of Eric E. Sterling) ("Sterling Testimony") at 1-2, *available at* http://www.src-project.org/resources/ussc-materials/testimony/written-testimony-for-public-hearing-on-proposed-guideline-amendments-mar-22-1993/. The bill's supporters admitted as much at the time. One Senator "[v]ery candidly" observed that "none of us has had an adequate opportunity to study" the bill because "[i]t did not emerge from the crucible of the committee process, tempered by the heat of debate." 132 Cong. Rec. 26,462 (1986) (remarks of Sen. Mathias). Senator Dole conceded it was "probably correct" that Congress was "rushing a judgment on the drug bill." *Id.* at 26,434. And another member went so far as to compare "the sanctimonious election stampede of the House of Representatives" to "a congressional lynch mob." *Id.* at 26,441 (Sen. Evans).

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[3] Contemporaneous media reports erroneously linked Bias's death to crack: he had in fact used powder cocaine. 1995 Report 122-23.

2. The Congressional Record contains no empirical justification for the 100-to-1 ratio.[4] Indeed, the floor statements do not address that figure at all. 1995 Report 117. Nor was the 100-to-1 ratio discussed at the single four-hour Senate hearing dedicated to the crack issue. "Although the 1986 Congressional hearing with respect to crack cocaine . . . was filled with general statements about the dangers of crack and the economics of crack distribution, Congress had no hard evidence before it to support the contention that crack is 100 times

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[4] Because the committee process for the ADAA was curtailed, "[t]he only record of congressional intent is contained in the statements made on the floors of the House and Senate in favor of the Act." William Spade, Jr., *Beyond the 100:1 Ratio: Towards a Rational Cocaine Sentencing Policy*, 38 Ariz. L. Rev. 1233, 1252 (1996).

more potent or dangerous than powder cocaine." *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring).[5] To the contrary, Sterling admitted that, in the rushed atmosphere that summer, numbers were simply plucked from thin air. For example, the 50-to-1 ratio proposed in an earlier version of the bill "was arbitrarily doubled" in the final act "simply to symbolize redoubled congressional seriousness;" it "reflects no actual calculation of the relative harmfulness to society or an individual of a given number of doses of an illegal drug." Sterling Testimony 4, 6.

3. The legislative record does reflect that Congress had three general justifications for being especially tough when it came to crack quantities:

- *First*, the goal of the ADAA was to target "major drug traffickers." *Kimbrough*, 552 U.S. at 98. After "consulting with law enforcement professionals but without holding hearings," Congress believed the low quantities triggering mandatory minimum penalties "generally would be associated with major and serious traffickers" in crack. 1995 Report

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[5] Moreover, during the single brief discussion of mandatory minimum sentences, one law enforcement witness could not "honestly answer" whether the penalties would deter crime, and the other recommended a one-year mandatory term of imprisonment—far lower than the provisions that ultimately became law. *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 65 (1986) (testimony of Deputy Inspector Martin Boyle, New York Policy Department); *id.* (testimony of Sheriff James Adams, Sumter County, Florida).

120-21 (citing floor statements and subcommittee work on a prior bill).

- *Second*, unnamed reports were cited attributing crack to unusually high levels of violence and other social harms. For example, one Member of Congress alleged that "crack use" had "engendered increased crime in several cities" because "[u]sers become so deranged from its psychotic effects that they may perpetrate brutal crimes." 132 Cong. Rec. 22,991 (1986) (Rep. Dorgan); *see also* 1995 Report 180-81 ("[M]embers perceived crack cocaine to be '[c]ausing crime to go up at a tremendously increased rate. . . .'" (citation omitted)).
- *Third*, Congress thought crack required special treatment "because of the especially lethal characteristics of this form of cocaine." 132 Cong. Rec. 26,447 (1986) (Sen. Chiles); *see also, e.g., id.* at 22,993 (1986) (Rep. LaFalce) ("Crack is thought to be even more highly addictive than other forms of cocaine or heroin.").

But it clear from the legislative record that Congress based these conclusions on isolated anecdotes, and had no empirical data to support these justifications. That is perhaps unsurprising because the crack phenomenon was still new in 1986. Marcia R. Chaiken, U.S. Dep't of Justice, Nat'l Inst. of Justice, *Identifying and Responding to New Forms of Drug Abuse: Lessons Learned from "Crack" and "Ice"* 33 (1993). Accordingly:

- The "drug enforcement experts" who provided Congress with information about appropriate crack quantities were largely working in the dark on a market that "was just emerging." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 4-5 (1997) ("1997 Report").

- As late as 1995 there were still only a "handful" of localized, contradictory studies on the correlation between cocaine and crime. 1995 Report 94-97, 106-07. One suggested that "the current focus on crack-related violence may be more the result of a media event than an emergent trend." *Id.* at 97 (citation omitted).
- One medical expert who testified at the Senate hearing conceded that researchers had yet to "find out the results of cocaine use . . . [or] the basic mechanisms of addiction." *"Crack" Cocaine: Hearing Before the Permanent Subcomm. on Investigations of the S. Comm. on Governmental Affairs*, 99th Cong. 21 (1986) (statement of Dr. Robert Byck, Professor of Psychiatry and Pharmacology, Yale University School of Medicine). Even by 1990 "[r]elatively little ha[d] been published describing the human pharmacology of cocaine smoking under controlled or semicontrolled laboratory conditions." Reese T. Jones, *The Pharmacology of Cocaine Smoking in Humans, in National Institute on Drug Abuse Research Monograph No. 99: Research Findings on Smoking of Abused Substances* 30, 32 (C. Nora Chiang & Richard L. Hawks eds., 1990) (citations omitted).

Put simply, Congress's general decision to punish crack more harshly than powder cocaine had no more evidentiary basis than its specific decision to use the 100-to-1 ratio to implement that policy objective. That is reason enough to reject any further imposition of the ratio against any defendant.

II. SUBSEQUENT EMPIRICAL DATA CONCLUSIVELY UNDERMINE THE JUSTIFICATIONS FOR THE OLD RATIO

Following Congress's passage of the AADA in 1986, every expert of whom we are aware who considered the 100-to-1 ratio concluded that it could not be justified and needed to be substantially reduced. The most prominent example is the Sentencing Commission, which considered and rejected the ratio in 1995, 1997, 2002, and 2007. 1995 Report 195-98; 1997 Report 9; U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 104 (2002) ("2002 Report"); U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 8 (2007) ("2007 Report"). Numerous federal judges,[6] commentators,[7] and various organizations reached the same conclusion.[8] Most notably, of course,

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[6] *See, e.g.*, Letter from Judge John S. Martin, Jr. and 26 other judges of the United States Circuit Courts of Appeals and District Courts to Senator Orrin Hatch, Chairman of the Senate Judiciary Comm., and Congressman Henry Hyde, Chairman of the House Judiciary Comm. (Sept. 16, 1997), *reprinted in* 10 Fed. Sent'g Rep. 194, 194 (1998) ("It is our strongly held view that the current disparity between powder cocaine and crack cocaine . . . can not be justified and results in sentences that are unjust and do not serve society's interest."); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995); *United States v. Ricks*, 494 F.3d 394, 400 (3d Cir. 2007); *United States*

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v. Washington, 127 F.3d 510, 518 (6th Cir. 1997) (Jones, J., concurring in part and dissenting in part); *Willis*, 967 F.2d at 1226 (Heaney, J., concurring); *United States v. Pruitt*, 502 F.3d 1154, 1171 n.2 (10th Cir. 2007) (McConnell, J., concurring); *United States v. Williams*, 472 F.3d 835, 845 n.4 (11th Cir. 2006) (Barkett, J., dissenting from denial of rehearing en banc); *United States v. Williams*, 481 F. Supp. 2d 1298, 1301-02 & n.5 (M.D. Fla. 2007); *United States v. Walls*, 841 F. Supp. 24, 31 (D.D.C. 1994); *United States v. Clay*, No. 2:03CR73, 2005 WL 1076243, at *4-5 (E.D. Tenn. May 6, 2005); *United States v. Perry*, 389 F. Supp. 2d 278, 307 (D.R.I. 2005); *United States v. Fisher*, 451 F. Supp. 2d 553, 559 (S.D.N.Y. 2005); *United States v. Smith*, 359 F. Supp. 2d 771, 780-81 (E.D. Wis. 2005); *and cf. Minnesota v. Russell*, 477 N.W.2d 886, 888 (1991).

[7] *See, e.g.*, William J. Stuntz, *Race, Class, and Drugs*, 98 Colum. L. Rev. 1795, 1835 (1998); Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time To Restore the Balance*, 16 Fed. Sent'g Rep. 87, 87 (2003); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. Rev. 1751, 1787 (1999); Spade, Jr., *supra* n.4, at 1238, 1287-88; Sklansky, *supra*, at 1288-89.

[8] *See, e.g.*, Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States, to Hon. Richardo H. Hinojosa, Chair, United States Sentencing Commission (Nov. 2, 2007) (reiterating opposition of the Judicial Conference to "the existing sentencing difference between crack and powder sentences"); Letter from Karen J. Mathis, President, Am. Bar Ass'n, to Rep. Bobby Scott, Chairman, and Rep. Randy Forbes, Ranking Member, Subcomm. on Crime, Terrorism and Homeland Security of the House Comm. on the Judiciary (July 3, 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/crimlaw/2007jul03_minimumsenth_l.authcheckdam.pdf (describing ABA's longstanding judgment "that there are no arguments supporting the draconian sentencing of crack cocaine offenders as compared to powder cocaine offenders"); Barbara R. Arnwine et al., Open Letter to the United States

Congress itself repudiated the 100-to-1 ratio in the FSA in order to restore basic fairness to federal cocaine sentencing.

Unlike Congress's original passage of the ADAA, this unanimity of opinion is based on a considerable body of data and experience gathered over the last 26 years. As we demonstrate below, that data and real-world experience conclusively undermine the original, purported justifications for the now-discredited 100-to-1 ratio. In fact, it is now beyond serious dispute that the old ratio failed to accomplish, and in numerous respects critically undermined, its intended purposes. For these reasons, it is clearer now than ever before that *any* imposition of the 100-to-1 ratio would be manifestly unjust, and that Congress could not have intended to allow such unfair sentences to be imposed after passage of the FSA.

A. The 100-to-1 Penalty Ratio Failed To Prioritize Federal Prosecutions Of Major Cocaine Traffickers

The principal goal of the ADAA's mandatory sentencing scheme was to "create the proper incentives for the Department of Justice to direct its 'most intense focus' on 'major traffickers' and 'serious traffickers.'" 1995 Report 119 (citing committee report on "an earlier version of the bill"); *see also* 132 Cong. Rec. S14,301 (Sen. Robert Byrd) (daily ed. Sept. 30, 1986) (the goal of the mandatory minimum

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Congress, Open Society Policy Center (Oct. 2, 2007), http://opensocietypolicycenter.org/wp-content/uploads/Open-Letter-on-Crack-Reform.pdf (letter from over 50 civic and religious leaders urging Congress to eliminate the unwarranted crack sentencing disparity).

structure generally was to impose ten years' imprisonment upon "the kingpins—the masterminds who are really running these operations," and five upon "middle-level dealers"). But the 100-to-1 ratio, together with the low quantities that triggered mandatory minimums for crack cocaine under the ADAA, did just the opposite. They effectively guaranteed that the focus of federal law enforcement would be on street-level dealers, who could and would be punished as much, or even more, than cocaine kingpins.

As noted above, when Congress enacted the ADAA, it believed that the low crack-quantity levels triggering mandatory minimums were consistent with its overall goal of targeting crack traffickers. But this belief—which was not based on any actual evidence—proved to be seriously mistaken. Contrary to Congress's stated objective, the lowest crack-quantity level targets "retail or street-level dealer[s]." 1997 Report 5. And when the 100-to-1 ratio was applied against those low-level dealers, they were subject to the same penalties as those Congress intended for "serious traffickers who deserve the five-year statutory penalty." *Id.* In other words, the ADAA enacted an absurd penalty structure under which crack defendants playing minor roles could be punished as or even more severely than the powder-cocaine traffickers ultimately responsible for the crack that the street-level defendants sold. *See* 1995 Report 67-68.

Moreover, what federal law enforcement actually focused on was the exact opposite of what the ADAA intended: imprisoning low-level participants in the crack trade. A consistent majority of federal crack defendants have been street-level dealers or even lower-level players, including crack *users*. 2007 Report 19 & fig. 2-4 (summarizing 2005 data reflecting that more than 60% of crack cocaine defendants were street-level dealers, couriers, low-level assistants, or users); *id.* at 21 fig. 2-6 (summarizing 2000 data reflecting that 66.5% of federal crack defendants were street-level dealers, and over 6% more were couriers, low-level assistants, or users); 1995 Report 158 ("The majority of crack defendants . . . are street-level."). And in 2005 street-level dealers of crack were serving an average of 97 months in prison, nearly *20 months longer on average* than the wholesaler who supplied the powder that the street dealer cooked into crack. 2007 Report 30 fig. 2-14. Indeed, the penalties imposed on street-level crack dealers and crack *couriers* historically *exceeded* those of the *highest-level importers*—the kingpins—of powder cocaine. *See* 2002 Report 43 fig. 9 (104 month average sentence for street-level dealer, 107 month average for couriers, but 101 month average for highest-level powder trafficker). Moreover, as one might expect, the vast majority of such low-level crimes were confined within a neighborhood or were similarly local, 2007 Report 22 fig. 2-7, meaning that federal resources were being diverted away from national and international crimes to the traditional jurisdiction of local law enforcement.[9]

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[9] Indeed, as differential penalties for crack over powder disappeared in the state system, *see* 2007 Report 98-99, the outlier federal scheme became the preferred jurisdiction for prosecution of crack offenses in this country. *See* Marc Mauer & Ryan King, The Sentencing Project, *A 25 Year Quagmire: The War on Drugs and Its Impact on American Society* 8 (2007)

By contrast, federal prosecutions of Congress's highest-level intended targets (importers, high-level suppliers, manufacturers, organizers, etc.) have remained stubbornly infrequent. *Id.* at 20-21 figs. 2-5, 2-6 (less than 13% of powder offenders and less than 9% of crack offenders in 2005, and even smaller numbers in 2000). And in 2005, even the largest category of traffickers above the street level (the "wholesalers") still only represented about one in five crack defendants overall. *Id.* This persistent focus on low-level offenders is not only directly contrary to Congress's stated policy objective, it is extremely inefficient.[10]

Finally, the 100-to-1 ratio presented perverse incentives leading to prosecutions that had nothing to do with deterring crack trafficking. In particular, because of the widely disparate penalties for crack

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(attributing "a rise of 144%" in the number of federal drug prosecutions "in the period of 1985-2002" to increasing numbers of state-case transfers "in order for the defendant to face stiffer penalties in the federal system"); *accord* 2007 Report 107 n.173.

[10] Jonathan P. Caulkins et al., RAND Corp., *Mandatory Minimum Drug Sentences: Throwing Away the Key or the Taxpayers' Money?* xxii-xxiii (1997) ("[M]andatory minimums would be the most cost-effective alternative [as compared to conventional enforcement and treatment] only . . . at dollar values [that] would typify only those dealers at a fairly high level in the cocaine trade and who are unusually difficult to arrest."); *see also* Anne Morrison Piehl & John J. DiIulio, Jr., *"Does Prison Pay?" Revisited*, The Brookings Rev., Winter 1995, at 25 (concluding from prisoner survey data that the "number of drug sales prevented by incarcerating a drug dealer" for a non-violent drug crime is "zero," and therefore valuing "drug crimes (sales and possession) at zero social cost" and citing other analysts as reaching "similar conclusions").

cocaine, the government went so far as to fabricate crack cases targeted at dealers who would otherwise sell powder cocaine, simply to increase the chances that the powder-cocaine defendant might plead guilty. For example, law enforcement officers would direct informants and undercover agents to insist upon delivery of crack even when the target had historically dealt only in powder. *E.g.*, *United States v. Fontes*, 415 F.3d 174, 177-79 (1st Cir. 2005); *United States v. Williams*, 372 F. Supp. 2d 1335, 1339 (M.D. Fla. 2005) ("[I]t was the government that decided to arrange a sting purchase of crack cocaine. Had the government decided to purchase powder cocaine (consistent with [defendant's] prior drug sales), the base criminal offense level would have been only 14 . . . ." (footnote omitted)).[11]

B. Crack Is Not 100 Times More Harmful To Society Than Powder Cocaine

As discussed above, the ADAA's enhanced penalties for crack were partly motivated by fear that crack, more than other drugs, "engendered increased crime." 132 Cong. Rec. 22,991 (1986) (Rep. Dorgan). Although Congress had no evidence to support this fear at the time, it is now clear that crack is not significantly more harmful to society than powder cocaine, and certainly not anything close to 100 times more harmful. In fact, the current view is that the ADAA *itself* causes substantial harm to society.

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[11] *Williams* was vacated and remanded on appeal. 456 F.3d 1353 (11th Cir. 2006), in a decision abrogated by *Kimbrough*.

1. There is some evidence that societal harms increased in the mid-1980s, at the same time crack became broadly available to the market.[12] But by the early 1990s the spike in crimes was over, even though rates of crack use remained constant. Roland G. Fryer, Jr. et al., *Measuring The Impact Of Crack Cocaine* 3-4, 27 (Nat'l Bureau of Econ. Research, Working Paper 11318, 2005), *available at* http://www.nber.org/papers/w11318 ("By the early 1990s . . . . the relationship between crack and unwelcome social outcomes had largely disappeared. Thus, though crack use persisted at high levels, it did so with relatively minor measurable social consequences."). Moreover, it turns out that the increased violence of concern to the ADAA Congress was not "engendered" by crack after all. Rather, that spike in violence, and the subsequent dip in the 1990s while crack use remained constant, were attributable to the newness of the crack market in the mid-1980s. *See, e.g.*, 2007 Report 86 & n.129; 1995 Report 96. In any event, it is clear that that early violence has now dissipated.

2. Over the last 15 years, there has been no significant difference between the social harms once associated with crack and those associated with powder cocaine.[13] It is now quite rare for crack or powder-cocaine offenses to be associated with

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[12] *See, e.g.*, Blumstein, *supra* n.7, at 88-89.

[13] This is not to suggest that there was no social cost to crack's entry into poor communities. But all drugs impose social costs. That is true for crack sold in poor communities and for powder cocaine sold in wealthier communities, although the wealthy have resources that allow them to mitigate the injuries. *See* Stuntz, *supra* n.7, at 1815.

"violent conduct," and to the modest extent such an association exists,[14] there is no statistically significant difference between powder cocaine and crack. *See* 2007 Report 37 & fig. 2-19 (in 2005, only 6.2% of powder cases and 10.4% of crack cases involved "violent conduct;" in 2000, 9.0% of powder cases and 11.6% of crack cases did); 2002 Report 57 fig. 19 (summarizing data reflecting homicide in 3.4% of both crack and cocaine cases). This evidence calls into question the legitimacy of any sentencing disparity between crack and powder cocaine based on the supposed risk of societal harms caused by crack, and certainly the extreme 100-to-1 disparity.

3. In fact, it is now well understood that the ADAA's exceptionally harsh treatment of crack offenses *itself* imposed social harm, for two reasons:

First, as *amici curiae* the American Civil Liberties Union ("ACLU") and other organizations explain, Congress has now embraced the widely held view that the 100-to-1 ratio has contributed to the unjustifiably disproportionate prosecution and incarceration of African Americans in this country. This unjust regime is extremely harmful to the lives of those citizens and society generally. "[A] broad array of recent empirical studies" suggests that "[w]hen citizens perceive the state to be furthering injustice . . . they are less likely to obey the law, assist law enforcement, or enforce the law themselves." Donald Braman, *Punishment and Accountability: Understanding and Reforming*

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[14] The most recent empirical review shows that approximately 90% of federal powder *and* crack offenses involve *no violence by any party*. 2007 Report 38 fig. 2-20 (2005 data).

Criminal Sanctions in America, 53 UCLA L. Rev. 1143, 1165 (2006).

Second, it is unjust to impose a massive sentence upon low-level crack defendants *solely* because of social harms they themselves are not directly responsible for. Yet for the crimes proscribed by the ADAA, crack quantity—the alleged proxy for those social harms—is the overriding determinant of the defendant's sentence, whether or not he has committed violence or engaged in other acts that could harm other people. *Cf.* Jon O. Newman, *The New Commission's Opportunity*, 10 Fed. Sent'g Rep. 44, 44 (1995) ("[W]ith respect to narcotics offenses . . . there is no good reason to make drug quantity the overriding determinant of punishment. . . . A better system would recognize that role in the offense is a far more significant measure of culpability than quantity.").

C. Crack Is Not 100 Times More Harmful To An Individual User Than Powder Cocaine

The 100-to-1 ratio vastly overstates the alleged pharmacological differences between crack and powder cocaine that Congress invoked in enacting the ADAA. As *amicus curiae* the ACLU explains,

- Crack and powder cocaine "have the same active ingredient and produce the same physiological and psychotropic effects." *DePierre*, 131 S. Ct. at 2228; *see also Kimbrough*, 552 U.S. at 94 (same).
- Exposure to crack and powder cocaine *in utero* also produces similar effects, and few, if any, long-term effects (after controlling for exposure to independent factors, like alcohol

and tobacco). *See* 2007 Report 68-69; Barry Zuckerman et al., *Cocaine Exposed Infants and Developmental Outcomes: "Crack Kids" Revisited*, 287 J. Am. Med. Ass'n 1990, 1990-91 (2002).

- The risk of cocaine dependence is similarly high among both crack cocaine smokers and those who inject cocaine hydrochloride. *See* Dorothy K. Hatsukami & Marian W. Fischman, *Crack Cocaine and Cocaine Hydrocloride: Are the Differences Myth or Reality?*, 279 J. Am. Med. Ass'n 1580, 1582-83 (1996).

Thus, in the long run, crack and powder cocaine have substantially equivalent effects upon the user. *See id.* at 1581.

Although smoking cocaine (the typical administration of crack) may present more risk of addiction than insufflating (*i.e.*, snorting) cocaine (the typical administration of powder), the 100-to-1 ratio is based on the chemical form of cocaine, not how it is administered. As a result, the ratio guarantees unjust sentences. For example, a small-time dealer caught with, say, 50 grams of powder cocaine who supplies intravenous users does not receive a mandatory minimum sentence, whereas a small-time dealer in crack caught with the same amount would receive a ten-year mandatory minimum sentence, even though the harm to the users is the same.[15]

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[15] Over 12% of the population of powder cocaine users inject the drug, by one estimate. *See* Dep't of Health & Human Servs., *Treatment Episode Data Set (TEDS) 1993-2003: National*

III. CORRECTING THE ERRONEOUS POST-FSA SENTENCES WILL NOT BURDEN THE FEDERAL CRIMINAL JUSTICE SYSTEM

Applying the FSA's provisions to defendants sentenced on or after August 3, 2010 will require new sentencing proceedings for a proportion of the pipeline defendants. The exact number is unclear; it might reach the thousands, but it is certainly substantially fewer than 5,000. *See Frequently Asked Questions: The Fair Sentencing Act of 2010, S.1789 Federal Crack Reform Bill*, Families Against Mandatory Minimums 3 (Aug. 3, 2011), http://www.famm.org/Repository/Files/FSA%20FAQ%208.3.11.pdf (estimating that approximately 3,800 pipeline defendants had been sentenced to mandatory minimums in the year following the FSA's enactment); U.S. Sentencing Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 205-06 (2011) (3,905 crack defendants were convicted in fiscal year 2010 of offenses subject to a mandatory minimum; only 64% of those remained subject to a mandatory minimum at sentencing). A concern that these proceedings would somehow unduly tax the federal judiciary cannot justify perpetuating a sentencing regime that should have ended on August 2, 2010, as Congress intended. *Cf. United States v. Booker*, 543 U.S. 220, 244 (2005). But, in any case, recent experience has shown that this concern is unwarranted.

Admissions to Substance Abuse Treatment Services tbl. 3.4 (Nov. 2005), *available at* http://wwwdasis.samhsa.gov/teds03/teds_03_tbl3.4.htm.

The federal criminal justice community can efficiently and effectively manage a temporary increase in cases requiring similar review. Indeed, since the 2007 Guideline amendment that retroactively lowered the base offense level applicable for crack offenses, federal courts have received more than 25,000 requests for sentence reductions pursuant to 18 U.S.C. § 3582(c) and granted more than 16,000 of them. Sentencing Guidelines for the United States Courts, 76 Fed. Reg. 41,332, 41,333-34 (July 13, 2011). Speaking on behalf of the Criminal Law Committee of the Judicial Conference of the United States, Judge Walton remarked that "this workload was managed surprisingly well."[16] Information systems and operating procedures were put in place.[17] The courts, probation departments, prosecutors, and defense attorneys collaborated to identify, prioritize, and process cases.[18] The Bureau of Prisons expanded inmate access to legal resources and created systems to ensure new sentences were implemented "rapidly and accurately."[19] The end result, in the words of Judge Castillo, a former member of the Sentencing Commission, was the "greatest untold success story" in federal sentencing. Transcript of Hearing Before the U.S. Sentencing Comm'n, New York, N.Y. (July 9, 2009), at 204 (statement of Judge Ruben Castillo), *available at* http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090709-10/Public_Hearing_Transcript.pdf.

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[16] *Testimony of Judge Reggie B. Walton Presented to the U.S. Sentencing Commission on June 1, 2011 on the Retroactivity of the Crack Cocaine Guideline Amendment*, U.S. Sentencing Comm'n (June 1, 2011), at 3. http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Reggie_Walton.pdf.

[17] *Id.*

[18] *See, e.g.*, *Testimony of James E. Felman on behalf of the Am. Bar Ass'n before the U.S. Sentencing Commission for the Hearing Regarding Retroactivity of Amendments Implementing The Fair Sentencing Act of 2010*, U.S. Sentencing Comm'n (June 1, 2011), at 4, http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_ABA_James_Felman.pdf.

This experience created valuable institutional knowledge that can be used in future instances of Guideline retroactivity, or, as in this case, the retroactivity of a statutory penalty scheme. And unlike a case of Guideline retroactivity, which can implicate cases decided decades ago,[20] new sentencing proceedings for pipeline defendants will only implicate recently concluded cases. The same judge, prosecutor, defense counsel, and probation officer will be available in many instances. Factfinding essential to the sentencing will, in all likelihood, have already occurred. There is therefore every reason to conclude that it will be seamless and swift to correct the erroneous sentences received by some pipeline defendants.

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[19] *Statement of Thomas R. Kane, Acting Director, Federal Bureau of Prisons, Before the U.S. Sentencing Commission Hearing on Retroactive Application of the Proposed Amendment to the Federal Sentencing Guidelines Implement the Fair Sentencing Act of 2010*, U.S. Sentencing Comm'n 2 (June 1, 2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20110601/Testimony_Thomas_Kane.pdf.

[20] U.S. Sentencing Comm'n, *Analysis of the Impact of the Crack Cocaine Amendment If Made Retroactive* 4 (2007).

CONCLUSION

For the foregoing reasons, the judgments of the court of appeals should be reversed.

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RECORD
AND
BRIEF

Supreme Court, U.S.
FILED
MAR 8 - 2012
OFFICE OF THE CLERK

Nos. 11-5683 and 11-5721

IN THE

Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

COREY A. HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Writs Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit**

BRIEF OF THE COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENTS BELOW

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b)(1), applies retroactively to defendants whose criminal conduct occurred before the effective date of the Act, but who are sentenced after that date.

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

- A. STATUTORY BACKGROUND 2
- B. THE PRESENT CONTROVERSIES 5
- C. SUBSEQUENT DEVELOPMENTS 8

SUMMARY OF ARGUMENT 11

ARGUMENT 16

- I. UNDER SECTION 109, THE FSA DOES NOT APPLY RETROACTIVELY TO DEFENDANTS WHOSE CRIMES WERE COMMITTED BEFORE ITS EFFECTIVE DATE 19
  - A. THE FSA "REPEAL[ED]" PRIOR PENALTY PROVISIONS 19
  - B. RETROACTIVE APPLICATION OF THE FSA WOULD "RELEASE OR EXTINGUISH" THE "PENALT[IES]" THAT PETITIONERS "INCURRED UNDER" PRIOR LAW 31
- II. NOTHING IN THE FSA'S TEXT, HISTORY, OR PURPOSE CLEARLY INDICATES CONGRESS'S INTENT TO DISPLACE SECTION 109 36
  - A. THE FSA'S TEXT IS CONSISTENT WITH SECTION 109'S PRESUMPTION OF ANTI-RETROACTIVITY 39
  - B. NEITHER THE FSA'S HISTORY NOR ITS PURPOSE ESTABLISHES THAT CONGRESS INTENDED THE FSA TO APPLY RETROACTIVELY 50

C. NEITHER LENITY NOR CONSTITUTIONAL AVOIDANCE HAS ANY APPLICATION HERE 54

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

CASES

Albernaz v. *United States*,
450 U.S. 333 (1981) 40

Bell v. *Maryland*,
378 U.S. 226 (1964) 3

Bifulco v. *United States*,
447 U.S. 381 (1980) 55

Blakely v. *Washington*,
542 U.S. 296 (2004) 46

Bradley v. *United States*,
410 U.S. 605 (1973) 4, 22, 26

Brady v. *United States*,
397 U.S. 742 (1970) 46

Brock v. *Pierce Cnty.*,
476 U.S. 253 (1986) 30

Calder v. *Bull*,
3 U.S. (3 Dall.) 386 (1798) 37

Callanan v. *United States*,
364 U.S. 587 (1961) 39, 55

Cannon v. *Univ. of Chi.*,
441 U.S. 677 (1979) 39

Central Bank of Denver, N.A. v.
First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 31

Clark v. *Martinez*,
543 U.S. 371 (2005) 54

Clay v. *United States*,
537 U.S. 522 (2003) 48

Commonwealth v. *Kimball*,
38 Mass. 373 (21 Pick.) (1838) 26

Finley v. *United States*,
490 U.S. 545 (1989) 24, 25

Fletcher v. *Peck*,
10 U.S. (6 Cranch) 87 (1810) 18

Gozlon-Peretz v. *United States*,
498 U.S. 395 (1991) 55

Great N. Ry. Co. v. *United States*,
208 U.S. 452 (1908) ....*passim*

Gutierrez v. *Ada*,
528 U.S. 250 (2000) 43

Hamm v. *City of Rock Hill*,
379 U.S. 306 (1964) 21, 27, 28, 29, 30

Hertz v. *Woodman*,
218 U.S. 205 (1910) 18, 34, 35

Holiday v. *United States*,
683 A.2d 61 (D.C. 1996) 26

Landgraf v. *USA Film Prods.*,
511 U.S. 244 (1994) 51

Lindsey v. *Washington*,
301 U.S. 397 (1937) 33

Lockhart v. *United States*,
546 U.S. 142 (2005) 18

Marcello v. *Bonds*,
349 U.S. 302 (1955) 17, 53

Matsushita Elec. Indus. Co. v. *Epstein*,
516 U.S. 367 (1996)..18

McNeill v. *United States*,
131 S. Ct. 2218 (2011)....................15, 17, 47, 49

Mobil Oil Corp. v. *Higginbotham*,
436 U.S. 618 (1978)..36

Moorehead v. *Hunter*,
198 F.2d 52 (10th Cir. 1952)........................22, 27

Moskal v. *United States*,
498 U.S. 103 (1990)..55

Muscarello v. *United States*,
524 U.S. 125 (1998)..55

Neal v. *United States*,
516 U.S. 284 (1996)...................................24, 43

Norfolk S. Ry. Co. v. *Sorrell*,
549 U.S. 158 (2007)..51

Norris v. *Crocker*,
54 U.S. (13 How.) 429 (1851)..............................3

Patterson v. *McLean Credit Union*,
491 U.S. 164 (1989)..24

Pipefitters Local Union No. 562 v.
United States,
407 U.S. 385 (1972)...................................28, 29

Posadas v. *Nat'l City Bank of N.Y.*,
296 U.S. 497 (1936)...................................20, 21

Ratzlaf v. *United States*,
510 U.S. 135 (1994)..30

Rex v. *Davis*,
168 Eng. Rep. 238 (1785)..................................26

Richmond Screw Anchor Co. v.
United States,
275 U.S. 331 (1928) 23

Rodriguez v. *United States*,
480 U.S. 522 (1987) 50, 51

Shannon v. *United States*,
512 U.S. 573 (1994) 50

Spears v. *United States*,
555 U.S. 261 (2009) 43

State v. *Daley*,
29 Conn. 272, 1860 WL 1173 (1860) 27

State v. *Reis*,
165 P.3d 980 (Haw. 2007) 49

United States v. *Bell*,
624 F.3d 803 (7th Cir. 2010) 6, 48

United States v. *Breier*,
813 F.2d 212 (9th Cir. 1987) 22

United States v. *Goncalves*,
642 F.3d 245 (1st Cir. 2011) 33

United States v. *Gonzalez*,
520 U.S. 1 (1997) 25

United States v. *Holcomb*,
657 F.3d 445 (7th Cir. 2011) ....*passim*

United States v. *Jacobs*,
919 F.2d 10 (3d Cir. 1990) 22

United States v. *Krieger*,
628 F.3d 857 (7th Cir. 2010) 33

United States v. *Mechem*,
509 F.2d 1193 (10th Cir. 1975) 22

United States v. *Passmore*,
27 F. Cas. 458 (C.C.D. Pa. 1804) 3

United States v. *Reisinger*,
128 U.S. 398 (1888) 32, 33, 35

United States v. *Rodgers*,
466 U.S. 475 (1984) 55

United States v. *Sidney*,
648 F.3d 904 (8th Cir. 2011) 47

United States v. *Smith*,
354 F.3d 171 (2d Cir. 2003) 26

United States v. *Stillwell*,
854 F.2d 1045 (7th Cir. 1988) 22

United States v. *Texas*,
507 U.S. 529 (1993) 36

United States v. *Tynen*,
78 U.S. (11 Wall.) 88 (1871) ....*passim*

United States v. *Ulrici*,
28 F. Cas. 328 (C.C.E.D. Mo. 1875) 32, 36

Vill. of Arlington Heights v.
Metro. Housing Dev. Corp.,
429 U.S. 252 (1977) 54

Warden v. *Marrero*,
417 U.S. 653 (1974) ....*passim*

Washington v. *Davis*,
426 U.S. 229 (1976) 55

White v. *Warden*,
566 F.2d 57 (9th Cir. 1977) 22

Wong Yang Sung v. *McGrath*,
339 U.S. 33 (1950) 31

Woods v. *Interstate Realty Co.*,
337 U.S. 535 (1949) 24

STATUTES

1 U.S.C. § 109 .... *passim*

18 U.S.C. § 3553 .... 43, 44

21 U.S.C. § 841 .... *passim*

21 U.S.C. § 844 20

21 U.S.C. § 960 20

28 U.S.C. § 994 .... 41, 43

Act of Feb. 25, 1871, 16 Stat. 432 .... 4, 28

Dodd-Frank Wall Street Reform and
Consumer Protection Act, Pub. L.
No. 111-203, 124 Stat. 1376 (2010) 42

Fair Sentencing Act of 2010,
Pub. L. No. 111-220, 124 Stat. 2372 .... *passim*

Patient Protection and Affordable Care Act,
Pub. L. No. 111-148, 124 Stat. 119 (2010) 42

Secure and Responsible Drug Disposal
Act of 2010, Pub. L. No. 111-273,
124 Stat. 2858 42

OTHER AUTHORITIES

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*Judicial Business of the United States
Courts* (2011) 42

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Cong. Globe, 41st Cong., 3d Sess. (1871) 30

W.S. Gilbert & Arthur Sullivan, *Iolanthe* 54

Matthew Hale, *Historia Placitorum Coronae* (1847 ed.) (1736) 2, 4

William Hawkins, *Treatise of the Pleas of the Crown* (3d ed. 1739) 3

Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) 33

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John P. MacKenzie, Comment, Hamm *v.* City of Rock Hill *and the Federal Saving Statute*, 54 Geo. L.J. 173 (1965) 28, 30, 31

Sentencing Guidelines for United States Courts, 76 Fed. Reg. 3193 (Jan. 19, 2011) 42

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U.S. Sentencing Comm'n, *Memorandum: Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* (2011) 46

U.S. Sentencing Comm'n,
Rules of Practice and Procedure (2007) 41

U.S. Sentencing Guidelines Manual (2011) 42

U.S.S.G. § 5G1.1 .... 43, 44

Webster's New International Dictionary
(2d ed. 1949) 33

Webster's Third New International
Dictionary (1976) 25

BRIEF OF THE
COURT-APPOINTED *AMICUS CURIAE*
IN SUPPORT OF THE JUDGMENTS BELOW

INTEREST OF *AMICUS CURIAE*

This brief is submitted in response to the Court's order inviting Miguel A. Estrada to brief and argue these cases as *amicus curiae* in support of the judgments below.

STATUTORY PROVISIONS INVOLVED

The general saving statute, 1 U.S.C. § 109, provides in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, is reproduced in the appendix to the government's brief (at 5a-12a).

STATEMENT

Petitioners Hill and Dorsey committed crack-cocaine offenses and were convicted, but not sentenced, before the enactment of the Fair Sentencing Act of 2010 ("FSA"), Pub. L. No. 111-220, 124 Stat. 2372, which raised the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b)(1). Both of them were sentenced in accordance with the law at the time of their offenses, and the pre-FSA mandatory minimums for crack-cocaine offenses dictated their sentences.

The government sought and obtained these mandatory-minimum sentences, and it successfully defended them on appeal to the Seventh Circuit. The government's position was required by the Department of Justice, which had advised prosecutors "[i]mmediately following the enactment" of the FSA that the "new penalties would apply prospectively only to *offense conduct* occurring on or after the [FSA's] effective date." U.S. Br. 2a. Agreeing with the government, the Seventh Circuit reasoned that the general saving statute precludes retroactive application of the FSA to release criminal punishments incurred under prior law, *see* 1 U.S.C. § 109, and that nothing in the FSA provides a contrary indication.

After Hill filed his petition for a writ of certiorari, and shortly before the filing of Dorsey's petition, the Attorney General announced an abrupt change in the government's position. According to the new position, the FSA should apply to sentencing proceedings on or after the FSA's effective date, but not to any pre-existing sentences, including those still pending on direct review. U.S. Br. 3a. The Seventh Circuit declined, however, to reconsider its precedent following this switch. *See United States* v. *Holcomb*, 657 F.3d 445 (7th Cir. 2011).

A. STATUTORY BACKGROUND

At common law, "the offenses committed before" the repeal of a criminal statute were "discharged by such repeal," and could not "be proceeded upon after such repeal, unless a specific clause in the act of repeal be made enabling such proceedings after the repeal." 1 Matthew Hale, *Historia Placitorum Coronae* 291 (1847 ed.) (1736); *see also, e.g.*, 1 William Hawkins, *Treatise of the Pleas of the Crown* 107 (3d ed. 1739) ("If one commit an Offense which is made Felony by statute, and then the statute be repealed, he cannot be punished as a felon in respect of that statute.").

The precise origins of this abatement doctrine are unclear. *See* Albert Levitt, *Repeal of Penal Statutes and Effect on Pending Prosecutions*, 9 A.B.A. J. 715, 715-16 (1923). But whatever its pedigree, it was quickly and widely adopted in the United States. *See, e.g.*, *United States* v. *Passmore*, 27 F. Cas. 458, 459 (C.C.D. Pa. 1804) (No. 16,005) (Washington, J.); *see also Bell* v. *Maryland*, 378 U.S. 226, 231 n.2 (1964) (collecting citations); Levitt, *supra*, at 715 n.5 (same). As this Court explained, "[t]here can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence." *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871). "By the repeal," therefore, "the legislative will is expressed that no further proceedings be had under the act repealed." *Ibid.*

Although some repealing statutes contained clauses that expressly displaced prior law, many others contained no such repealing language. *See, e.g.*, *Norris* v. *Crocker*, 54 U.S. (13 How.) 429, 438 (1851). Courts therefore looked instead to whether "the two [statutes] are repugnant in any of their provisions," in which case "the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first." *Tynen*, 78 U.S. (11 Wall.) at 92.

Importantly, courts found the inconsistency required for repeal not only by evaluating the substantive reach of the old and new statutes, but also by comparing differences in the *penalties* they imposed.

"Common-law abatements" thus "resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties." *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *see also, e.g.*, *Bradley* v. *United States*, 410 U.S. 605, 608 (1973) ("the rule applied even when the penalty was reduced").

Because the abatement doctrine established only a default rule, it was inapplicable where the legislature provided a saving clause preserving the repealed law for defendants whose conduct had already occurred. *See, e.g.*, 1 Hale, *supra*, at 291. Many legislatures therefore found it advantageous to enact *general* saving statutes governing future amendments to the criminal law. *See* Comment, *Today's Law & Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 127-30 (1972) (collecting examples).

Congress followed suit in 1871, adopting a federal saving statute, *see* Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432, to "abolish" the common-law presumption and reverse the rule that "the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition,'" *Marrero*, 417 U.S. at 660 (quoting *Bradley*, 410 U.S. at 607). The saving statute, now codified at 1 U.S.C. § 109, provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide." As this Court has noted, the statute's broad language was designed to "bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense." *Marrero*, 417 U.S. at 661.

Against this backdrop, Congress enacted the FSA in 2010. Among other changes, the FSA increases the threshold quantities of crack cocaine necessary to trigger mandatory-minimum sentences and fines under 21 U.S.C. § 841(b)(1), *see* FSA § 2, 124 Stat. 2372, and repeals the previously applicable mandatory-minimum sentence for simple possession of crack cocaine, *id.* § 3, 124 Stat. 2373. At the same time, the FSA increases the amount of fines that may be imposed on the same defendants, *see id.* § 4, 124 Stat. 2372-73, as well as directs the Sentencing Commission to impose other sentencing increases for particular offenders, *id.* §§ 5-7, 124 Stat. 2373-74. The FSA became effective when signed by the President on August 3, 2010.

B. THE PRESENT CONTROVERSIES

1. *Dorsey* (No. 11-5683)

After selling crack cocaine to a government informant on August 6, 2008, Dorsey was arrested and charged with one count of possessing with intent to distribute five or more grams of crack cocaine. Dorsey J.A. 9, 48-49. He pleaded guilty on June 3, 2010. *Id.* at 21. On September 10, 2010, he was sentenced to the applicable pre-FSA mandatory minimum of ten years. *Id.* at 67-68, 80, 85.

On appeal, Dorsey argued that he should instead have been sentenced under the FSA, in which case he would not have faced a mandatory-minimum sentence. In response, the government urged the Seventh Circuit to uphold Dorsey's sentence. Section 109 "*requires* Congress to 'expressly provide' for retroactive application of an ameliorative penalty provision in order to avoid the default rule that such a provision does not apply retroactively," the government argued, but "'the FSA does not contain so much as a hint that Congress intended it to apply retroactively.'" U.S. *Dorsey* C.A. Br. 14-15 (quoting *United States* v. *Bell*, 624 F.3d 803, 814 (7th Cir. 2010)). The government maintained that "[t]he controlling date for purposes of savings statute analysis is—and should be—the date of the offense conduct," *id.* at 19, particularly since "[t]here is no meaningful distinction between defendants sentenced before and after the effective date of the FSA," *id.* at 18.

The Seventh Circuit affirmed. Dorsey Pet. App. A1-A4. The court rejected Dorsey's contention that the "necessary implication" of the FSA requires that it "be applied retroactively" to defendants sentenced after its effective date. *Id.* at A3. "Given the longstanding debate surrounding, and high-level congressional awareness of, this issue," the court explained, "we are hesitant to read in by implication anything not obvious in the text of the FSA." *Id.* at A4.

The Seventh Circuit also emphasized that, "if Congress wanted the FSA" to "apply to not-yet-sentenced defendants convicted on pre-FSA conduct, it would have at least dropped a hint to that effect somewhere in the text of the FSA." Dorsey Pet. App. 4a. "Given the absence of any direct statement or necessary implication to the contrary," the court concluded, "the FSA does not apply retroactively," and "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Ibid.*

The Seventh Circuit denied Dorsey's petition for rehearing en banc. Dorsey J.A. 103-15. Judge Williams, joined by Judge Hamilton, dissented on the ground that, in her view, Congress intended the FSA to extend to all individuals sentenced after its effective date. *Id.* at 107-08, 111.

2. *Hill* (No. 11-5683)

On March 28, 2007, Hill sold 53.3 grams of crack cocaine to a government informant and was subsequently charged with one count of distributing 50 grams or more of crack cocaine. Hill J.A. 6, 69. He was convicted by a jury on April 20, 2009. *Id.* at 83. His sentencing did not occur until December 2, 2010, at which time he was sentenced to the applicable pre-FSA mandatory minimum of ten years. *Id.* at 78, 85.[1]

On appeal, Hill argued that he should have been sentenced under the FSA, which would have resulted in a mandatory-minimum sentence of five years. The government disagreed. It emphasized that nothing in the FSA required retroactivity with sufficient clarity to displace Section 109: "Congress was not unambiguous about retroactivity in the FSA; it was silent." U.S. *Hill* C.A. Br. 13 n.5. Thus, the government contended, "[t]he controlling date for the purposes of savings statute analysis is and should be the date of the offense conduct." *Id.* at 14.

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[1] Although Hill was sentenced under 21 U.S.C. § 841(b)(1)(A) for a larger quantity of crack cocaine than Dorsey, who was sentenced under Section 841(b)(1)(B), the applicable mandatory-minimum sentences were the same in light of Dorsey's prior convictions for felony drug offenses. The quantity-based mandatory minimum for Dorsey was five years, but that sentence was doubled under Section 841(b)(1)(B) because of his prior convictions. Had Dorsey been sentenced under the FSA, no minimum sentence would have applied based on quantity, and thus there would have been nothing to double.

The Seventh Circuit affirmed. Hill Pet. App. A1-A2. Invoking its earlier decision in Dorsey's appeal, the Seventh Circuit concluded that the FSA "does not apply retroactively," and that "the relevant date for determining whether the [FSA] applies is the date of the offense conduct, rather than the date of sentencing." *Id.* at A2.

C. SUBSEQUENT DEVELOPMENTS

On July 15, 2011, after the Seventh Circuit's decisions in *Dorsey* and *Hill*, the Attorney General issued a "Memorandum for All Federal Prosecutors," which changed the government's position on the retroactivity issue. U.S. Br. 1a-4a. The memorandum acknowledged that, "[i]mmediately following the enactment" of the FSA, the Department of Justice had "advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010." *Id.* at 2a. It nonetheless concluded that a different policy was warranted to "restor[e] fairness in cocaine sentencing." *Id.* at 4a.

The Attorney General conceded that "the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment" of the FSA. U.S. Br. 3a. "Congress did not intend," he noted, "that its new statutory penalties would apply retroactively to defendants sentenced prior to August 3." *Ibid.* Based on his view that Congress nonetheless intended the FSA to apply "as expeditiously as possible," however, the Attorney General "concluded that the law requires the application of the [FSA]'s new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place." *Ibid.*

The Attorney General's memorandum was submitted to the Seventh Circuit in several appeals that had been filed by the government with the Solicitor General's authorization, and had subsequently been resolved in the government's favor. *Holcomb*, 657 F.3d at 445 (Easterbrook, C.J., concurring in denial of rehearing). A member of the court called for a vote on whether to rehear the appeals en banc, which failed when the judges divided evenly on the question. *See ibid.* (order).

1. Chief Judge Easterbrook, joined by four judges, voted against rehearing. He emphasized that the Attorney General's approach would require "partial retroactivity," in which the FSA "does not apply to cases in which sentence was pronounced on August 2, 2010, or earlier, even if they were pending in the district court or appeal on August 3." 657 F.3d at 445-46. "As far as [he was] aware," however, "the Supreme Court has never held any change in a criminal penalty to be partially retroactive." *Id.* at 446. Rather, "[t]he choice always has been binary: retroactive or prospective." *Ibid.*

Chief Judge Easterbrook emphasized that Section 109 "makes all changes" to criminal punishments "prospective unless the new statute provides otherwise." 657 F.3d at 446. Although the defendants had argued that Section 109 is irrelevant to the FSA, he explained that "a law reducing criminal punishment is a repeal of the old statute and the enactment of a new one for the purpose of [Section] 109, and that a punishment is incurred when the crime is committed." *Ibid.* Thus, Section 109 "makes the [FSA] prospective, because [the latter] lacks an express declaration of retroactivity." *Ibid.*

Although Chief Judge Easterbrook noted that the court "gives respectful consideration to the rationale for the new position" whenever the "Executive Branch confesses error," he also observed that "[t]he Memorandum does not discuss [Section] 109 or the language of the [FSA]," and "does not explain why *partial* retroactivity is appropriate—or why the transition should depend on the date of sentencing rather than some other event." 657 F.3d at 447. "The observation that Congress, the President, and many federal judges think the former rules excessively severe," he noted, "does not distinguish the [FSA] from any other law reducing sentences and does not justify disregarding the anti-retroactivity norm created by [Section] 109." *Ibid.*

Chief Judge Easterbrook acknowledged that, although Section 109 "says that only an 'express' provision in a later statute can support retroactivity," Congress is nonetheless "entitled to change that rule," and "[a] necessary (or fair) implication" could "show that Congress has amended [Section] 109 to that extent." 657 F.3d at 448. The FSA, however, contains no such implication. Section 8 of the FSA, for instance, which grants the Sentencing Commission emergency authority to promulgate amended guidelines, did not "imply anything about when the new minimum and maximum sentences go into force." *Id.* at 450. And Congress's directive in Section 10 of the FSA—instructing the Commission to generate a report on the FSA's effects within five years—also does not suggest retroactivity; indeed, if it had any relevance, the report would "produce meaningful results only if limited to persons whose criminal conduct occurs while the [FSA] is in force." *Ibid.*

2. Judge Williams, joined by four judges, dissented from the denial of rehearing. She questioned why "Congress [would] want sentencing judges to continue to impose sentences that it had already declared to be unfair." *Holcomb*, 657 F.3d at 457 (emphasis omitted). In addition to joining Judge Williams's dissent, Judge Posner dissented separately, arguing that a "literal interpretation" of the FSA would lead to "perverse results." *Id.* at 462.

SUMMARY OF ARGUMENT

The FSA does not apply retroactively to defendants whose criminal conduct occurred before its effective date, whether or not the defendants were (like Petitioners here) sentenced after that date. Section 109 forbids retroactivity, and nothing in the FSA expressly or impliedly repeals that command.

I. Since 1871, Congress has provided, by statute, a default rule governing when changes to the criminal law apply retroactively to benefit defendants who incurred penalties under prior law. The general saving statute provides that, in the absence of an "expres[s] provi[sion]" to the contrary, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute." 1 U.S.C. § 109. Section 109 governs here: Applying the FSA retroactively would "release or extinguish" the mandatory-minimum "penalt[ies]" that Petitioners "incurred under" the now-"repeal[ed]" prior law. Because the FSA does not *expressly* provide for retroactive application, Section 109 dictates that it be applied prospectively.

A. The FSA "repeal[ed]" the prior law governing sentences for crack-cocaine offenses by increasing the drug-quantity thresholds necessary to trigger mandatory-minimum sentences under 21 U.S.C. § 841(b).

Although Dorsey seeks to characterize the FSA as only "amending" Section 841(b), the pre- and post-FSA versions of the statute cannot both be applied to the same offender; possession of 5 grams of crack cocaine was, but is no longer, punished by a five-year mandatory minimum, and possession of 50 grams is now punished by a five-year minimum instead of the previously applicable ten-year sentence.

Dorsey nonetheless contends that Section 109 is inapplicable to "ameliorative" amendments in which, as here, the relevant penalty provisions are lowered. This Court has already held, however, that Section 109 governs, and precludes retroactive application of the new statute, in exactly these circumstances. *See Warden* v. *Marrero*, 417 U.S. 653, 660 (1974). And even if this Court were to ignore the overwhelming force of *stare decisis* in the statutory context, Section 109 speaks with unmistakable clarity in addressing the repeal of "*any* statute," and precluding the release of "*any* penalty" incurred under prior law—including the mandatory-minimum sentences that Petitioners now seek to avoid.

B. Section 109 provides that the FSA's repeal of the previously applicable mandatory minimums will not be applied retroactively if doing so would avoid "any penalty, forfeiture, or liability incurred under" prior law. 1 U.S.C. § 109. This Court has recognized that the phrase "penalty, forfeiture, or liability" includes all forms of criminal punishment, *see*, *e.g.*, *Marrero*, 417 U.S. at 661, and thus the only remaining issue is whether the mandatory-minimum sentences provided by Section 841(b) were "incurred under" the prior version of the statute.

As lexicographers since Samuel Johnson have recognized, the defendant "incur[s]" a penalty when he becomes liable to it. And that occurs, in turn, at the time of the criminal conduct—not, as Dorsey would prefer, when the defendant is ultimately sentenced. Although Dorsey insists that prosecution and sentencing are additional "facts" that must occur before any penalty is incurred, the Court has previously applied Section 109 even where the defendant was not sentenced (or even indicted) until after the repeal at issue. Dorsey's approach also ignores the second clause of Section 109, which provides that the repealed statute will "remai[n] in force for the purpose of sustaining any proper action or prosecution for the enforcement of *such penalty*." 1 U.S.C. § 109 (emphasis added). This clause would make little sense if "such penalty" were not incurred until after sentencing.

II. Section 109 is an enacted federal statute that binds the courts, but it does not bind Congress. Congress is free, subject to constitutional constraints, to apply changes in the criminal law retroactively if it desires to do so. But in the absence of any express indication to that effect, the Court can conclude that Congress superseded Section 109 in a later statute *only* if it concludes that the later statute amounts to an implied repeal of Section 109. Petitioners and the government seek to elide the implied-repeal standard, offering isolated strands of text and history to suggest that Congress perhaps *assumed* some retroactive application of the FSA. But these materials do not give rise even to a weak inference of retroactivity, much less anything that would satisfy the demanding standard for finding an implied repeal of Section 109.

A. Petitioners and the government invoke Section 8 of the FSA, which grants the Sentencing

Commission emergency authority to adopt certain amendments to the Sentencing Guidelines. It is far from clear that this provision addresses itself to the minimum-quantity thresholds revised in Section 2 of the FSA. But assuming that it does, Congress had a perfectly good reason to expedite the revision process that requires *no* retroactive application of the FSA: The ordinary process for amending the Guidelines could have left Guidelines based on prior law in place well after passage of the FSA, during which time *post*-FSA offenders would be sentenced under preexisting Guidelines higher than the new mandatory minimums.

Petitioners and the government fare no better in invoking Section 10 of the FSA, which requires the Commission to report to Congress within five years on the effect of the FSA's changes. Contrary to their assumption, it is hardly likely that the bulk of offenders sentenced during that time will have committed their offenses before the FSA was enacted, and thus the Commission should have more than adequate data even if the FSA applies only prospectively. And even if it were otherwise, Petitioners and the government never explain why Congress would have wanted to study how its change in sentencing practices affects the decisions of those who violated federal law before that change was introduced.

Yet even if Petitioners and the government were correct that their reading of Sections 2 and 10 provides some inference regarding retroactivity, the interpretation that they draw from those provisions is sufficiently absurd that Congress could not have intended it. In their telling, Congress intended the FSA to be applied retroactively to defendants whose crimes occurred before—but whose sentencing occurred after—enactment of the statute, but not to otherwise *identically* situated defendants who happen to have been sentenced earlier. The Court recently noted the absurdity of permitting criminal penalties to "depend on the timing of the federal sentencing proceeding," *McNeill* v. *United States*, 131 S. Ct. 2218, 2223-24 (2011), yet that is *precisely* the approach that Petitioners and the government would attribute to Congress. There is no reason to believe that Congress meant for defendants guilty of the same crime, committed at the same time and perhaps even as part of a single conspiracy, to be sentenced differently based on the happenstance of how quickly the judicial system resolved their cases.

B. Petitioners and the government similarly miss the mark in invoking the history and purpose of the FSA. They emphasize that the FSA was designed to eliminate "unfairness" in the sentencing process. Congress never avowedly changes sentencing practices to make them *less* fair; yet the general rule enacted by Congress in Section 109 precludes retroactive application of those changes in the mine run of cases.

Moreover, Petitioners and the government err by assuming that whatever they believe to further the FSA's objective must be the law; rather, as this Court frequently notes, legislation involves compromises among competing values. That is particularly true in the case of the FSA, which adopts a mix of provisions that in some cases favor, and in others disfavor, crack-cocaine offenders. Petitioners and the government cannot single out only the former for retroactive treatment.

Petitioners and the government nonetheless insist that congressional intent on the retroactivity issue can be discerned from the fact that the bill ultimately enacted by Congress lacks an express anti-retroactivity provision that had been contained in an earlier House bill. This language would have been surplusage in light of Section 109, however, so no inferences about Congress's intent can be drawn from its omission.

C. Finally, Petitioners urge this Court to resolve any ambiguities on the retroactivity issue in their favor by invoking the rule of lenity and constitutional avoidance. Neither doctrine applies here. Petitioners claim that the FSA is potentially a violation of the equal-protection component of the Fifth Amendment. But constitutional avoidance requires *serious* doubts about the constitutionality of the statute, and there is no serious contention that the crack-cocaine sentencing regime involves the sort of *intentional* discrimination necessary to raise equal-protection concerns. And the rule of lenity is applicable only where, after applying the ordinary tools of statutory construction, there remains uncertainty about whether Congress intended to subject an offender to increased punishment. There is, however, no room for ambiguity here.

ARGUMENT

This case involves the interaction between two provisions adopted by Congress. The general saving statute provides that, in the absence of express direction by Congress, changes in the criminal law do not apply retroactively to release penalties incurred before those changes take effect. *See* 1 U.S.C § 109. The FSA is such a change: It eliminates or reduces the minimum sentences previously applicable to certain drug offenses, without any express indication that Congress intended the change to apply retroactively. Under Section 109, therefore, the FSA cannot be applied to drug offenses that occurred before its enactment.

Petitioners and the government do not dispute that the FSA is inapplicable to defendants who were sentenced before its effective date. They nonetheless advance a theory of "partial retroactivity," under which the FSA applies to defendants whose criminal activity occurred before, but who were not sentenced until after, the statute became effective. Under this approach, two defendants whose criminal activity was identical in *every* respect, including the date of the offense, could be sentenced differently depending solely on the speed with which their prosecutions moved through the judicial system.

Although it would be strange and unprecedented to have the FSA's "applicability depend on the timing of the federal sentencing proceeding," *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011), Congress could perhaps have enacted that approach. The question is whether it did so.

Section 109 provides the starting point for this inquiry: Congress has provided clear and binding direction to the courts that, when it intends criminal legislation to release previously incurred penalties, it will say so expressly. As enacted law in its own right, Section 109 must be "treated as if incorporated in and as a part of subsequent enactments." *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908). And because Congress did not provide for retroactivity in the FSA, it should not "lightly . . . be presumed" by the courts. *Marcello* v. *Bonds*, 349 U.S. 302, 310 (1955).

Although Section 109 provides the governing rule for construing later statutes, Congress is free to repeal any law, including Section 109 itself. *See Great N. Ry.*, 208 U.S. at 465; *see also, e.g.*, *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810). But the standard for declaring that Congress superseded Section 109, in the absence of any statement to that effect in the FSA, is intentionally high: It requires a *repeal* of the earlier law by "necessary" or "plain" implication from the later statute. *Great N. Ry.*, 208 U.S. at 465; *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910); *see also, e.g.*, *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("unambiguous import").

That is because, if Section 109 textually applies, it must be given effect unless another exercise of the lawmaking power requires a different outcome. To conclude that Section 109 has been implicitly superseded, the Court *must* find that the FSA amounts to a partial implied repeal of the statute—an inquiry subject to the "stringent standard" that "there be an 'irreconcilable conflict' between the two federal statutes at issue." *Matsushita Elec. Indus. Co.* v. *Epstein*, 516 U.S. 367, 381 (1996). Cherry-picked legislative remarks and gauzy inferences that do not amount to a new *law* on the specific point at issue—retroactivity—do not carry the day.

Here, Section 109 applies, and nothing in the FSA repeals its anti-retroactivity command. Because there is "no conflict" between Section 109 and the FSA on the retroactivity question, *Warden* v. *Marrero*, 417 U.S. 653, 659 n.10 (1974), the "general principles of construction requiring, if possible, that effect be given to all the parts of a law" demand applying Section 109 to preclude retroactivity, *Great N. Ry.*, 208 U.S. at 465.

I. UNDER SECTION 109, THE FSA DOES NOT APPLY RETROACTIVELY TO DEFENDANTS WHOSE CRIMES WERE COMMITTED BEFORE ITS EFFECTIVE DATE.

The Seventh Circuit correctly held that the FSA's alteration of the drug-quantity thresholds necessary to trigger mandatory-minimum sentences does not apply retroactively to defendants whose criminal conduct predates the FSA, regardless of when their sentencing occurs. The FSA "repeal[ed]" prior penalty provisions applicable to the relevant drug offenses, and retroactive application of the FSA to defendants whose conduct predated it would "release or extinguish" the "penalt[ies]"—that is, fines and mandatory-minimum terms of imprisonment—"incurred under" prior law. 1 U.S.C. § 109. Because it is common ground that "[t]he FSA does not expressly state that the amended provisions of 21 U.S.C. [§] 841(b) will apply in sentencing proceedings for pre-enactment offenders," U.S. Br. 26, Section 109 prohibits retroactive application of the FSA.[2]

A. THE FSA "REPEAL[ED]" PRIOR PENALTY PROVISIONS.

Section 109 applies when a later-enacted statute "repeal[s]" an earlier penalty provision. According to Dorsey, however, the FSA did not "repeal" prior law but is instead an "ameliorative amendmen[t]." Dorsey Br. 39. This false dichotomy is foreclosed by the statutory text and inconsistent with this Court's longstanding caselaw governing Section 109. It is undoubtedly for this reason that the government has rejected Dorsey's position, *see* U.S. Br. 50 (noting that "the FSA is the sort of ameliorative criminal legislation that may trigger" Section 109), and that even Hill cannot bring himself to endorse the argument, *see* Hill Br. 32 (suggesting only that Dorsey "might" be correct).

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[2] *See, e.g.*, Hill Br. 16 (discussing "[l]egislative silence" about retroactivity); Dorsey Br. 16 (conceding that the FSA does not "expressly" manifest congressional intent on the issue).

1. As this Court recognized shortly after Section 109 was enacted, the governing test for whether a later statute "operates . . . as a repeal of the first" is whether "the two are repugnant in any of their provisions." *United States* v. *Tynen*, 78 U.S. (11 Wall.) 88, 92 (1871). "Where provisions in the two acts are in irreconcilable conflict," then "the later act to the extent of the conflict constitutes an implied repeal of the earlier one." *Posadas* v. *Nat'l City Bank of N.Y.*, 296 U.S. 497, 503 (1936).

This test is plainly satisfied here. The FSA replaced the drug-quantity thresholds necessary to trigger fines and mandatory-minimum sentences under 21 U.S.C. §§ 841 and 960, and it abolished the mandatory-minimum sentence under 21 U.S.C. § 844. In these respects, the FSA lowered the applicable imprisonment penalties (while increasing the maximum fines) for precisely the same illegal conduct, in ways that are "clear[ly] repugnan[t]" (*Tynen*, 78 U.S. (11 Wall.) at 92) to the prior penalty provisions: Although defendants who possess 5 or 50 grams of crack cocaine would have faced five- or ten-year mandatory-minimum sentences before the FSA's effective date, those same amounts no longer trigger the previously applicable minimum sentences; defendants who possess 5 grams of crack are no longer subject to a mandatory-minimum sentence, whereas those who possess 50 grams are now subject to a five-year minimum rather than ten years, as was formerly the case.

2. Dorsey attempts to draw a sharp distinction between "repeals" and "amendments," noting that the FSA describes itself only as "amend[ing]" Section 841(b). Dorsey Br. 43 (quoting FSA § 2(a), 124 Stat. 2372). This ignores, however, that the FSA expressly eliminated the old thresholds by "striking" them from Section 841(b)(1) and replacing them with new thresholds. FSA § 2(a)-(b), 124 Stat. 2372. As a consequence of the FSA's enactment, the version of Section 841(b)(1) that prescribed the relevant penalties for both Petitioners is no longer in effect.

There are indeed amendments that do not repeal prior law, in which case "the later act is to be construed as a continuation of, and not a substitute for, the first act." *Posadas*, 296 U.S. at 503; *see also Tynen*, 78 U.S. (11 Wall.) at 92 ("the rule is to give effect to both if possible"). But whether the later statute is characterized as an "amendment" or otherwise, the test for "repeal" is the same: whether the later statute "irreconcilabl[y] conflict[s]" with the earlier one. *Posadas*, 296 U.S. at 503; *cf. Hamm* v. *City of Rock Hill*, 379 U.S. 306, 314 (1964) (noting that the federal saving statute applies to "amendment and repeal"). Here, there is no question that the pre- and post-FSA versions of 21 U.S.C. § 841(b) cannot *both* be applied to the *same* offender.

Indeed, Dorsey's own sources confirm that a "repeal" includes the enactment of a new provision that "'contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force'" with respect to the same offender. Dorsey Br. 40 n.18 (quoting *Black's Law Dictionary* 67 (2d ed. 1891)). When an amendment replaces certain statutory terms with other terms, the two provisions are irreconcilable, and only one can remain in force.

It is therefore "immaterial" whether an "existing statute is specifically repealed and a new and different one is passed to replace it, or whether the existing statute is modified by amendment." *Moorehead* v. *Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). "In either event, a new statute comes into being and the old one ceases to exist." *Ibid.*; *see also United States* v. *Jacobs*, 919 F.2d 10, 12 (3d Cir. 1990) (Cowen, J., joined by Alito, J.) ("plain language of the saving statute indicates that it prevents statutory amendments from affecting penalties retroactively").[3] Because the FSA's "amendment" of Section 841(b) operated as a "repeal" of the previously applicable mandatory-minimum provisions, Section 109 applies.

3. As this Court has recognized, "[a]batement by repeal" at common law "included a statute's repeal and reenactment with different penalties." *Bradley* v. *United States*, 410 U.S. 605, 607-08 (1973). Dorsey nonetheless insists that Section 109 should be interpreted as applying only "when a statute amended a prior statute by *increasing* the penalties," so that it would not "preclude the application of *ameliorative* penalty provisions." Dorsey Br. 47, 51 (second em-

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[3] *See also, e.g.*, *United States* v. *Stillwell*, 854 F.2d 1045, 1048 (7th Cir. 1988) (noting that Section 109 "has been repeatedly held to apply to amendments to criminal statutes"); *United States* v. *Breier*, 813 F.2d 212, 215 (9th Cir. 1987) (Section 109 "appl[ies] to statutory amendments"); *White* v. *Warden*, 566 F.2d 57, 59 (9th Cir. 1977) (same); *United States* v. *Mechem*, 509 F.2d 1193, 1194 n.3 (10th Cir. 1975) (per curiam) ("The saving statute is not made inapplicable because an amendment instead of outright repeal changes a statutory punishment.").

phasis added); *see also* NACDL Amicus Br. 3-12. It is not clear how this argument helps Dorsey's position, since the FSA reduces imprisonment, but raises fines, for the same offenders. But even if the Court were to focus solely on the "ameliorative" portion, Dorsey's argument is baseless.

a. Dorsey's purported distinction between "ameliorative" and other amendments is foreclosed by this Court's decision in *Marrero*. The Court emphasized that "[c]ommon-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, *whether the re-enacted legislation increased or decreased the penalties*." 417 U.S. at 660 (emphasis added). The Court therefore held that Section 109 "bar[red] the Board of Parole from considering respondent for parole" (*id.* at 659) based on a statutory amendment that would undoubtedly be considered "ameliorative" in Dorsey's view. *See*, *e.g.*, *id.* at 664 (noting that the previously applicable parole prohibition was a "punitive measure").

Dorsey claims that *Marrero*'s "holding was unnecessary," and thus "might be considered dicta," because "[t]he repealing statute in that case" also "included a saving clause." Dorsey Br. 53. But even Dorsey is forced to acknowledge that this Court's discussion of Section 109 was an "alternative holding." *Id.* at 55. After addressing the statute-specific saving clause, the Court "*h[e]ld further* that the general saving clause" in Section 109 precluded retroactive application of the statutory change. *Marrero*, 417 U.S. at 659 (emphasis added). "It does not make a reason given for a conclusion in a case *obiter dictum*" that "it is only one of two reasons for the same conclusion." *Richmond Screw Anchor Co.* v. *United*

States, 275 U.S. 331, 340 (1928); *see also, e.g.*, *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

Because *Marrero*'s interpretation of Section 109 was a holding rather than *dictum*, the suggestion by Dorsey and his *amici* that the Court should "reconsider" (Dorsey Br. 39) or "repudiate" (NACDL *Amicus* Br. 2) *Marrero* is profoundly misplaced. "Considerations of *stare decisis* have special force in the area of statutory interpretation," because "Congress remains free to alter what [the Court] ha[s] done." *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-73 (1989); *see also Neal* v. *United States*, 516 U.S. 284, 295 (1996) ("[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*").

If Congress had any reason to believe that this Court misinterpreted Section 109 in *Marrero*, it has had nearly four decades to correct the problem. Yet it has continued to legislate against the backdrop of Section 109, just as it had done for the previous century of the statute's existence, without any change in its language.

Indeed, Congress's decision not to amend Section 109 is particularly significant because that statute is a "framework la[w] that facilitate[s] interpretation—and thus facilitate[s] legislation, too, by giving the legislature a formulary to use." *Holcomb*, 657 F.3d at 448 (Easterbrook, C.J., concurring in denial of rehearing). As this Court has noted, it is of "paramount importance" that "Congress be able to legislate against a background of clear interpretive rules, so that it may know the effect of the language it adopts." *Finley* v. *United States*, 490 U.S. 545, 556 (1989). This Court's decision in *Marrero* is precisely such a "clear interpret[ation]" of Section 109, yet

Congress has provided no indication that it would prefer to "legislate against a [different] background." *Ibid.*

b. Even if this Court were free to revisit the issue, it should conclude—as *Marrero* did—that Section 109 applies equally to "ameliorative" statutory amendments. Tellingly, Dorsey opens his argument on this point by discussing the legislative history of Section 109, *see* Dorsey Br. 44-46, but he somehow never gets around to addressing the statutory text. There is a simple reason for this omission: Section 109 does not support any distinction between "ameliorative" and other changes to penalty provisions.

Section 109 addresses the "repeal of *any* statute" that would otherwise release "*any* penalty." 1 U.S.C. § 109 (emphases added). "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzalez*, 520 U.S. 1, 5 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Congress did not cabin this broad statutory language based on the nature of the repeal at issue, nor did it limit the statute's focus to a particular type of change in penalties. Because retroactive application of the FSA would release previously incurred mandatory-minimum sentences, Section 109 applies.

The history of Section 109 further confirms that it applies even to "ameliorative" amendments. Section 109 was enacted to displace the common-law doctrine of abatement. *See*, *e.g.*, *Marrero*, 417 U.S. at 660. And Dorsey does not seriously dispute that, at common law, there were "instances in which prosecutions were abated following an amendment that lowered a penalty," Dorsey Br. 51; indeed, he concedes "at least six" such abatements, *id.* at 48 n.24

(citing *Ameliorative Criminal Legislation*, *supra*, at 126 nn.41-43); *see also, e.g., Commonwealth* v. *Kimball*, 38 Mass. (21 Pick.) 373, 376-77 (1838) (statute changing penalty from fine of $20 to fine between $10 and $20); *Rex* v. *Davis*, 168 Eng. Rep. 238 (1785) (statute changing penalty from death to fine). Shortly after Section 109's enactment, indeed, this Court drew no distinction between increases and decreases to prior penalties: In *Tynen*, the Court held that a statute increasing the applicable penalties in some respects, and decreasing them in others, repealed (and abated prosecutions under) an earlier statute. 78 U.S. (11 Wall.) at 93.

Dorsey nonetheless envisions a contrary rule under which, "rather than abate prosecutions," courts would sometimes apply later-enacted, but "ameliorative," penalty provisions. Dorsey Br. 49. This Court has already recognized, however, that "[c]ommon-law abatements" did not depend on whether the new statute "increased or decreased the penalties." *Marrero*, 417 U.S. at 660; *see also Bradley*, 410 U.S. at 608 (same). Rather, "[b]y the repeal the legislative will is expressed that no further proceedings be had under the act repealed." *Tynen*, 78 U.S. (11 Wall.) at 95. Because this rule applied universally to any repeal, there was full abatement at common law whether the repeal was ameliorative or otherwise. Section 109 was thus "designed to ensure that a convicted criminal does not fortuitously benefit from more lenient laws that may be passed after he or she has been convicted." *United States* v. *Smith*, 354 F.3d 171, 174 (2d Cir. 2003) (Sotomayor, J.); *see also, e.g., Holiday* v. *United States*, 683 A.2d 61, 79 (D.C. 1996) (emphasizing that, under Section 109, "individuals should be punished in accordance with the sanctions in effect at the time the offense was committed").[4]

c. Dorsey attempts to escape the plain text of Section 109 and this Court's decision in *Marrero* by invoking *Hamm*'s statement that Section 109 "was meant to obviate mere technical abatement." 379 U.S. at 314. According to Dorsey, "[a] 'technical abatement' occurred when a new statute amended a prior statute by *increasing* the penalties." Dorsey Br. 47. Dorsey's reliance on *Hamm* is misplaced.

In *Hamm*, the Court held that the Civil Rights Act abated prosecutions under state trespass laws that violated the Act's anti-discrimination provisions. 379 U.S. at 308, 312-16. The Court emphasized that

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[4] Dorsey also invokes the Tenth Circuit's statement in *Moorehead* that, "where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." 198 F.2d at 53. Even *Moorehead* acknowledged that this supposed rule "appl[ied] only where there [was] no general saving statute," *ibid.*, so it can hardly assist Dorsey here. But the Tenth Circuit was mistaken in any event. It is difficult to determine the precise basis for the Tenth Circuit's statement given its belief that "citation of authorities and their discussion and analysis would not be helpful." *Ibid.* The court appears, however, to have confused a distinct body of caselaw holding that, although a statutory change to the applicable penalties for a crime will abate prosecutions under prior law, the legislature may nonetheless choose to apply the new penalties to crimes committed before the amendment, just as it could decide to retain the old penalties through a saving clause. *See State* v. *Daley*, 29 Conn. 272, 1860 WL 1173, at *2 (1860) (discussing alternatives); *see also Ameliorative Criminal Legislation*, *supra*, at 123-24. That an increased penalty could not be imposed retroactively consistent with *ex post facto* principles explains why these cases always involved a reduction in the applicable penalty. *See Daley*, 1860 WL at *2.

Section 109 "was meant to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1871," in which "a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution." *Id.* at 314.[5] "In contrast," the Court explained, "the Civil Rights Act works no such technical abatement." *Ibid.* "[I]t substitutes a right for a crime," and "[s]o drastic a change is well beyond the narrow language of amendment and repeal." *Ibid.*

Dorsey reads the decision in *Hamm* as limiting Section 109 to cases where "a new statute amended a prior statute by *increasing* the penalties." Dorsey Br. 47. But as this Court has subsequently clarified, *Hamm*'s holding is that Section 109 does not apply where (unlike here) Congress radically changes the legal landscape, such as by replacing a criminal prohibition on certain conduct with an entitlement to engage in it. *See Pipefitters Local Union No. 562* v. *United States*, 407 U.S. 385, 434-35 (1972).

Although the statute at issue in *Pipefitters* "may . . . make lawful what was previously unlawful," the

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[5] The Court's original opinion reportedly stated that *Tynen* was "'decided in 1870,'" John P. MacKenzie, Comment, Hamm *v.* City of Rock Hill *and the Federal Saving Statute*, 54 Geo. L.J. 173, 174 (1965) (quoting preliminary print), which in context implied that Congress enacted Section 109 in response to *Tynen*. But *Tynen* was not decided until April 10, 1871—weeks *after* Section 109 was adopted. *Cf.* 16 Stat. 431. MacKenzie evidently apprised the Court of this error shortly after *Hamm* was issued, and the Court amended its opinion accordingly. *See* MacKenzie, *supra*, at 182 (reprinting letter from Supreme Court Reporter of Decisions). Even as amended, however, the Court's discussion of *Tynen* still incorrectly suggests that Congress was responding to *Tynen*.

Court declined to apply *Hamm* because the statute did not "substitute a right for a crime." 407 U.S. at 434 (alteration omitted). "To the contrary," the Court explained, the statute "retains the basic offense," and thus Section 109 applied. *Id.* at 434-35. Similarly here, the FSA "retains the basic offense"—the prohibitions on drug possession, distribution, and the like remain in force, *see* 21 U.S.C. § 841(a)—but alters only the applicable punishment. In no sense does the FSA create a "right" to engage in drug-related conduct where there once was a criminal proscription.

Yet even if this Court were to read *Hamm* as limiting Section 109 to "technical abatements," there is no basis for Dorsey's argument that only *increases* in the applicable penalties would result in a technical abatement. The Court cited *Tynen* as an example. *See* 379 U.S. at 314 ("such as that illustrated"). But the statute at issue there both increased and decreased the applicable penalties. *See supra* at 26. In any event, *Marrero* later emphasized that even penalty *decreases* could result in a technical abatement: "[I]f the repeal of [a penalty provision] can be viewed as mitigating [the defendant's] punishment under [prior law]," then "his conviction and sentence would not be left intact by the repealer and his prosecution would 'technically' abate under the common-law rule." 417 U.S. at 660 n.11 (citing *Hamm*, 379 U.S. at 314).

The logic of the common-law rule is that, once a new statute replaces an old one, no one can be prosecuted under the old version because it no longer exists; this result has nothing to do with the nature of the amendment—a new provision increasing penalties has "repealed" the prior law in exactly the same way as a new provision decreasing penalties. In either case, the original statute is "technically" gone. The adjective "technical" thus does not distinguish between increases or decreases in penalties, but between the "narrow language of amendment and repeal" that had given rise to artificial abatements at common law, and the type of "drastic" changes at issue in *Hamm*, in which previously criminal activities became protected activity. 379 U.S. at 314.

d. Finally, Dorsey's reliance on the saving statute's legislative history also misses the mark. As an initial matter, because Section 109 unambiguously applies to ameliorative sentencing amendments, this Court should "not resort to legislative history" at all. *Ratzlaf* v. *United States*, 510 U.S. 135, 147-48 (1994). In any event, there is no pertinent legislative history; Dorsey concedes that neither chamber even "discussed the saving statute during the debate of the 1871 Act." Dorsey Br. 44; *see also* John P. MacKenzie, Comment, Hamm *v.* City of Rock Hill *and the Federal Saving Statute*, 54 Geo. L.J. 173, 177 (1965).[6]

Dorsey's "legislative history" argument instead rests on the fact that, *following enactment of the saving statute*, the commissioners appointed to simplify and consolidate federal law proposed four provisions governing the effect of repeals, one of which would have reworded the saving statute. Dorsey Br. 45-46. They also noted, however, that the proposal "'embodie[d] the substance'" of the saving statute. MacKenzie, *supra*, at 181 (quoting *Commissioners' Draft of the Revision of the United States Statutes* (1872)). Congress's failure to adopt the proposals is as likely to have stemmed from the commissioners' inclusion of two new provisions, which would have "'add[ed]'" to existing law, as anything else. *Ibid.*

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[6] As Dorsey notes, one legislator noted that the 1871 statute provides "a few general rules for the construction of statutes, and the effect of repealing statutes, all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction." Cong. Globe, 41st Cong., 3d Sess. 1474 (1871). This is true, as far as it goes, but Dorsey never explains how it could support his interpretation of the statute—particularly since "statements by individual legislators . . . provide evidence of Congress'[s] intent" only "when they are consistent with the statutory language." *Brock* v. *Pierce Cnty.*, 476 U.S. 253, 263 (1986).

Dorsey assumes that, because (in his view) the proposed revision would more clearly have encompassed "ameliorative" amendments, Congress's failure to enact that proposal confirms that such amendments are outside the scope of Section 109. But the fact that another statute could be written to address an issue with even greater specificity does not mean that the existing statute is insufficiently clear to cover the situation. *See Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 47-48 (1950) (drawing "no inference" from "Congress'[s] failure to enact" a proposed "legislative clarification"). There is no basis for reading any particular interpretation of the saving statute into Congress's failure to adopt the proposal, let alone an interpretation so clearly at odds with the text of the statute. *See, e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994).

B. RETROACTIVE APPLICATION OF THE FSA WOULD "RELEASE OR EXTINGUISH" THE "PENALT[IES]" THAT PETITIONERS "INCURRED UNDER" PRIOR LAW.

Although the FSA "repeal[s]" previously applicable penalty provisions, Section 109 provides that this repeal "shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under" prior law. 1 U.S.C. § 109. The mandatory-minimum sentences applicable under prior law are "penalt[ies]" within the meaning of Section 109, and defendants whose conduct predated the FSA's effective date "incurred" those penalties "under" the old statute. Section 109 therefore bars retroactive application of the FSA to "release or extinguish" those previously incurred penalties.

1. The phrase "any penalty, forfeiture, or liability" in Section 109 includes criminal punishments. *United States* v. *Reisinger*, 128 U.S. 398, 402-03 (1888). Indeed, because "[t]hese words" were "used by the great masters of crown law and the elementary writers as synonymous with the word 'punishment,'" *id.* at 402, they sweep broadly to "include *all forms* of punishment for crime," *United States* v. *Ulrici*, 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594) (Miller, J.) (emphasis added), *quoted with approval in Marrero*, 417 U.S. at 661.

As this Court emphasized in *Marrero*, the issue whether a particular statutory change implicates a "'penalty, forfeiture, or liability' saved by [Section] 109" turns on whether the repealed provision was an "element of [the defendant's] 'punishment.'" 417 U.S. at 662-64. That is plainly the case here: Mandatory-minimum sentences are even more clearly an "element of [the] 'punishment" than ineligibility for parole, which this Court held in *Marrero* was subject to Section 109. Although parole affects only *where* the defendant serves his sentence, a mandatory minimum affects the duration of the sentence itself: Where a mandatory-minimum sentence is applicable, "the expected punishment will have increased and the government can require the judge to impose a higher punishment than she might have chosen otherwise." *United States* v. *Krieger*, 628 F.3d 857, 869 (7th Cir. 2010); *see also*, *e.g.*, *Lindsey* v. *Washington*, 301 U.S. 397, 401-02 (1937) (applying the state *ex post facto* clause to mandatory-minimum provision).

2. The mandatory-minimum sentences at issue here were also "incurred under" prior law because the crimes were committed before the effective date of the FSA—regardless of when the sentencing occurred. Although Dorsey claims that a mandatory-minimum sentence has not been "incurred" until, "at a minimum," the defendant has been "indicted, convicted, *and* sentenced," Dorsey Br. 24 & n.11, this interpretation finds no support in the text of Section 109 or this Court's precedents.

The defendant "incur[s]" a penalty when he "become[s] liable or subject" to it. *Webster's New International Dictionary* 1261 (2d ed. 1949); *see also* 1 Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) ("to become liable to a punishment or reprehension"). Even courts of appeals that have held on other grounds that the FSA applies retroactively have agreed that the defendant becomes subject to a penalty at "the time of the conduct that makes the defendant liable rather than the date of conviction or imposition of the sentence." *United States* v. *Goncalves*, 642 F.3d 245, 252 (1st Cir. 2011). The saving statute thus "clearly excepts offences *committed before* the passage of the repealing act." *Reisinger*, 128 U.S. at 401 (emphasis added).

Indeed, it is difficult to see how Dorsey can credibly advance a contrary interpretation. The judicial process verifies that the defendant has engaged in criminal wrongdoing and assesses the penalty, but that is not the process by which the defendant becomes subject to—that is, "incur[s]"—that penalty. And Congress, similarly, imposes the penalty for violating the law, not for doing a poor job in court.

According to Dorsey, however, his interpretation of "incurred" is compelled by this Court's decision in *Hertz* v. *Woodman*, which held that an inheritance tax was incurred at the time of the decedent's death and thus survived the later repeal of the tax statute at issue. 218 U.S. 205, 220 (1910). The Court reasoned that "the right of succession . . . passed by the death of the testator," and "fasten[ed], at the moment th[e] right of succession passed by death, a liability for the tax imposed upon the passing of every such inheritance or right of succession." *Id.* at 219-20.

Dorsey seizes on this Court's statement that the "liability for payment of the tax . . . accrued or arose the moment the right of succession by death passed" to the decedent's beneficiaries, at which point "the occurrence of *no other fact or event* was essential to the imposition of a liability for the statutory tax upon the interest thus acquired." *Hertz*, 218 U.S. at 220 (emphasis added). But the same is true here: Once Petitioners committed each element of an offense subject to the then-applicable mandatory minimum, "no other fact or event" (*ibid.*) was necessary for a mandatory-minimum sentence under then-existing law.

Dorsey appears to assume that *Hertz*'s reference to "fact or event . . . essential to the imposition of a liability" would include, in the criminal context, each step in the prosecutorial process, including "the return of an indictment and a subsequent conviction," Dorsey Br. 24, and "the determination of sentencing factors, such as drug quantity and the existence of a prior conviction," *id.* at 29. But this reading would completely garble the second clause of the statute. Section 109 not only preserves "any penalty, forfeiture, or liability incurred under [a repealed] statute," it also provides that "such statute" will "remai[n] in force for the purpose of sustaining any proper action or prosecution for the *enforcement of such penalty*." 1 U.S.C. 109 (emphasis added). The second clause allows the government to prosecute a defendant who has *already* incurred a penalty under a later-repealed statute—a provision that would make little sense if "such penalty" were not incurred until the defendant had already been convicted and sentenced.

Consistent with this commonsense reading of the statute, the Court has previously applied Section 109 where the defendant committed the offense at issue while the prior law was in effect but was sentenced only after its repeal. Indeed, in both *Reisinger* and *Great Northern Railway*, the defendants were not even indicted, let alone sentenced, for their crimes until after the repealing statutes had been enacted. *See Reisinger*, 128 U.S. at 400 (repeal in 1884; indictment in 1885 for conduct in 1883); *Great N. Ry.*, 208 U.S. at 459 (repeal in June 1906; indictment in November 1906 for conduct in 1905). Yet in both cases, the Court held that the saving statute prevented abatement of the prosecutions. *See Reisinger*, 128 U.S. at 401-03; *Great N. Ry.*, 208 U.S. at 464-70. Dorsey's reading of *Hertz* cannot be squared with these decisions.[7]

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[7] Dorsey briefly argues that Section 109 must be narrowly construed as a statute in derogation of the common law. Dorsey Br. 55-56. But this canon of construction is inapplicable where, as here, a statute "'speak[s] directly' to the question addressed by the common law" and manifests a clear purpose to abrogate

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II. NOTHING IN THE FSA'S TEXT, HISTORY, OR PURPOSE CLEARLY INDICATES CONGRESS'S INTENT TO DISPLACE SECTION 109.

According to Petitioners and the government, the text, history, and purpose of the FSA demonstrate that Congress intended to override the anti-retroactivity command of Section 109. They stress that the FSA's purpose was to displace a sentencing regime that was widely perceived as unfair, and they rely on two textual features that purportedly suggest that Congress intended the FSA to apply to all sentences imposed after its effective date.

The first of these textual features—Section 8 of the FSA—grants the Sentencing Commission emergency authority to issue "the guidelines, policy statements, or amendments provided for in [the FSA] as soon as practicable," and to make any "conforming amendments . . . necessary to achieve consistency with other guidelines provisions and applicable law." FSA § 8, 124 Stat. 2374. The second—Section 10 of the FSA—directs the Commission to study the "impact of the changes in Federal sentencing law" wrought by the FSA within five years of its enactment. FSA § 10, 124 Stat. 2375. That emergency authority, and the fact that pre-FSA offenders could be prosecuted within the five-year period to be studied, establishes—the argument goes—that Congress

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the common-law principle. *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (quoting *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618, 625 (1978)). Reversing the common-law rule is precisely why Congress enacted Section 109 in the first place. *See, e.g.*, *Ulrici*, 28 F. Cas. at 329 (describing the saving statute as "a general provision changing . . . the rule of the common law").

must have intended that the FSA apply to pre-FSA offenders.

Yet these arguments do not remotely demonstrate that Congress impliedly repealed the anti-retroactivity command of Section 109. Indeed, they do not support much of an inference about retroactivity at all—even apart from the exacting implied-repeal standard that applies here. *See supra* at 18.

As the government recognizes, the FSA was a package of changes to federal sentencing law, not all of them favorable to criminal defendants. While Section 2 of the FSA increased the quantities of crack cocaine necessary to trigger mandatory terms of imprisonment, for example, Section 4 steeply increased the fines applicable *to the same offenders*, whom Congress continues to view as "major drug traffickers." FSA § 4, 124 Stat. 2375. Section 7 directed the Commission to "review and amend" the Guidelines to cabin or further reduce the sentences of certain defendants whose role in the offense was minimal, FSA § 7, 124 Stat. 2372-73, while Sections 5 and 6 mandated "additional penalty increase[s]" for certain aggravating factors, FSA §§ 5-6, 124 Stat. 2373-74.

Neither the government nor Petitioners seriously suggest that Congress meant *all* of these changes to apply immediately to pre-FSA offenders. Indeed, retroactive application of the fine increases would undoubtedly violate the Constitution. *See, e.g.*, *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 391 (1798) (Chase, J.). And the same may be true of many applications of the aggravated Guidelines that the FSA prescribes. *See* U.S. Br. 29 n.6 (acknowledging, but disagreeing with, the weight of authority on this point). The government's view implausibly imputes to Congress an intent to apply immediately only those changes that favor offenders—even to the point of applying only *parts* of the amended versions of Sections 841(b)(1)(A) and (B) to particular defendants.[8] The FSA, however, provides no textual or structural hint that Congress intended offenders to take the sweet without the bitter.

It also does not advance the inquiry to note that the FSA was intended to make the law fairer. All legislation in a democracy is meant to improve things; no legislature sets out to make the law avowedly *less* just. That the current wisdom is better than the old is a basis for making *all* legislation retroactive—a position that cannot be squared with Section 109. Indeed, this logic would support retroactivity even as to final convictions, which no one advocates.

Nor does the legislative history of the FSA help the "retroactivity" view. Apart from decrying the unfairness of existing law, most floor statements on which Petitioners and the government rely merely assert that the FSA would change that immediately, as indeed it would for anyone who violated the law from the moment the President signed the FSA. The only aspect of the drafting history that is remotely pertinent to the specific question of retroactivity—that the FSA omits language expressly prohibiting retroactivity, which was present in an earlier bill—is equally consistent with the conclusion that such language was deemed repetitive of Section 109. *See Great N. Ry.*, 208 U.S. at 465.

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[8] For example, while Hill would no longer be subject to the 10-year mandatory-minimum prison sentence under the post-FSA version of 21 U.S.C. § 841(b)(1)(A), he still would be subject to the penalty provisions of 21 U.S.C. § 841(b)(1)(B), even as revised, because he was found guilty of distributing 50 grams or more of cocaine base. If the revised version of Section 841(b)(1)(B) were applied to him, therefore, he would face a maximum fine of $5 million, which is higher not only than the fine previously applicable to defendants prosecuted under Section 841(b)(1)(B) ($2 million), but also than the maximum fine Hill faced under the pre-FSA version of Section 841(b)(1)(A) ($4 million).

Because nothing in the text, history, or purpose of the FSA establishes that Congress intended partial retroactivity, Section 109 precludes it.

A. THE FSA'S TEXT IS CONSISTENT WITH SECTION 109'S PRESUMPTION OF ANTI-RETROACTIVITY.

Petitioners and the government contend that failure to give retroactive effect to the new drug-quantity thresholds would render Sections 8 and 10 of the FSA "empty and pointless" (Hill Br. 20) and "essentially irrelevant" (U.S. Br. 23). This argument echoes interpretive canons that disfavor superfluity and absurd results, but invokes neither expressly because they do not support retroactivity here. Sections 8 and 10 do not address retroactivity at all, and reading them literally to mean only what they do say accomplishes worthy goals that can sensibly be ascribed to Congress.

1. The FSA's most important textual feature, for purposes of this case, is its complete failure to say a single word about retroactivity. "Congress is, after all, not a body of laymen unfamiliar with the commonplaces of our law" but "predominantly a lawyers' body." *Callanan* v. *United States*, 364 U.S. 587, 594 (1961). For that reason, "[i]t is always appropriate to assume that our elected representatives . . . know the law." *Cannon* v. *Univ. of Chi.*, 441 U.S. 677, 696-97 (1979). Because Congress must be presumed aware

of the legal context in which it legislates, "if anything is to be assumed from congressional silence" on retroactivity, it is that "Congress was aware" of Section 109 and "legislated with [that provision] in mind." *Albernaz* v. *United States*, 450 U.S. 333, 341-42 (1981). Neither of Petitioners' textual arguments refutes this conclusion.

2. a. The "Emergency Authority" provision, Section 8(1) of the FSA, principally directs the Commission to promulgate "as soon as possible" the "guidelines, policy statements, or amendments provided for in this Act"—that is, by Sections 5-7 of the FSA. FSA § 8(1), 124 Stat. 2374. Section 2, which changes the minimum-quantity thresholds, does not "provide for" any new guidelines.

Section 8(2), in turn, directs the Commission to make "such conforming amendments" to the Guidelines as may be required to achieve "consistency with other guideline provisions and applicable law." FSA § 8(2), 124 Stat. 2374. This text most naturally suggests that the "conforming amendments" are those to be made to *existing* guidelines to achieve consistency with the new guidelines to be issued pursuant to Section 8(1).

Although it is certainly *possible* to read Section 8(2)'s reference to "applicable law" as including other provisions of the FSA itself—rather than, say, only those pre-existing legal rules that otherwise apply to the Sentencing Commission specifically or to administrative action generally, *see infra* at 41 n.9—that interpretation is far from unavoidable. Petitioners and the government thus vastly overstate their case by treating Section 8 as though Congress's principal objective was the immediate implementation of Section 2. *See* U.S. Br. 28 (urging that Congress "necessarily" meant this).

b. Even under that reading of Section 8, however, there was ample reason for Congress to require expedition in the formulation of new crack-cocaine guidelines for *post*-FSA offenses. The government makes much of the fact that for federal non-marijuana drug offenses the "median time between indictment and sentencing" is "approximately 11 months." U.S. Br. 30 n.7. But the *median* time means that half of all defendants are sentenced *sooner* than 11 months after their indictments—a period that could have swept in countless post-FSA offenders under pre-FSA Guidelines. Without emergency authority, the revised Guidelines would not have gone into effect for at least 180 days following the FSA's enactment, and possibly not until November 1, 2011—more than a year after the FSA's passage.[9]

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[9] Pursuant to its duty to "periodically . . . review and revise" the Guidelines, 28 U.S.C. § 994(o), the Commission may submit proposed amendments to Congress "at or after the beginning of a regular session of Congress, but not later than the first day of May," *id.* § 994(p). The Commission must also publish proposed amendments in the Federal Register and provide a notice-and-comment period of at least thirty days. *Id.* § 994(x). The proposed amendments must "take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted [to Congress] and no later than the first day of November of the calendar year in which the amendment . . . is submitted." *Id.* § 994(p). In practice, the Commission has adopted November 1 as the default effective date for its proposed amendments. *See* U.S. Sentencing Comm'n, *Rules of Practice and Procedure* § 4.1 (2007).

When Congress specifically instructs the Commission to conform the Guidelines to a new statute, the Commission typi-

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Moreover, the government fails to note that its statistics reflect a *national* pool of defendants; district courts in different regions have different backlogs, different dockets, and process cases at different speeds. *See* Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts*, tbls. D-6, at 254; D-12, at 276 (2011).

With each passing month before new Guidelines were announced, therefore, the risk increased that additional *post*-FSA offenders would be sentenced under pre-existing Guidelines. That obvious risk is all that is needed to make sense of Section 8's emergency authority; it is hardly necessary that the FSA be retroactive in order for Section 8 to have a real

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cally promulgates the necessary amendments through the same amendment process. In 2010, for example, Congress passed three statutes that instructed the Commission to promulgate conforming amendments to the Guidelines on a non-emergency basis: the Secure and Responsible Drug Disposal Act of 2010, Pub. L. No. 111-273, § 4, 124 Stat. 2858, 2860 (Oct. 12, 2010); the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 1079A(a)(1) & (a)(2), 124 Stat. 1376, 2077-79 (July 21, 2010); and the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 10606(a), 124 Stat. 119, 1006-07 (Mar. 23, 2010). The Commission responded to all three of these directives by publishing proposed amendments in the Federal Register on January 19, 2011, *see Sentencing Guidelines for United States Courts*, 76 Fed. Reg. 3193 (proposed Jan. 19, 2011), and then by submitting final amendments to Congress on April 28, 2011, *see Sentencing Guidelines for United States Courts*, 76 Fed. Reg. 24,960 (May 3, 2011). Each of the amendments took effect on November 1, 2011. *Ibid.*; *see also* U.S. Sentencing Guidelines Manual app. C, amend. 749 & 751 (2011).

"job" in the statutory scheme. *See Gutierrez* v. *Ada*, 528 U.S. 250, 258 (2000).[10]

c. There is no greater merit to the government's claim that Congress must have assumed retroactivity because it knew "that the resulting Guidelines amendments would apply immediately in all initial sentencing proceedings, including those involving offenses that predated the FSA." U.S. Br. 28-29 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)). This Court has held that the Guidelines in force at the time of sentencing cannot trump a mandatory-minimum penalty that otherwise is required by 21 U.S.C. § 841(b). *See Neal*, 516 U.S. at 289-90, 295. And the Guidelines themselves contemplate that statutory minimum sentences may exceed "the maximum of the applicable guideline range," and provide that, in such cases, "the statutorily required minimum sentence shall be the guideline sentence." U.S.S.G. § 5G1.1(b).

Thus, even if new Guidelines must "conform" to "the FSA's penalty structure," U.S. Br. 34, n.8, nothing about that requirement "creates a very different regime" (*ibid.*) for offenses that *predated* the FSA. When a defendant is sentenced for those offenses in accordance with Section 5G1.1(b), he *is* receiving a Guidelines sentence, and that sentence *does* "conform" to "applicable law."

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[10] Indeed, the fact that the "emergency" Guidelines might not issue for 90 days substantially weakens the retroactivity inference urged by the government. Under the government's view, mandatory minimums would no longer apply on August 4, but the old Guidelines could remain for 90 days—subject only to the *discretion* to depart from those guidelines that individual judges enjoy but need not exercise, *see, e.g., Spears* v. *United States*, 555 U.S. 261, 264-65 (2009) (per curiam), and to the possibility that the Commission might exercise its *discretion* to make the new amendments retroactive, *see* 28 U.S.C. 994(u). But Congress's willingness to live with old Guidelines for those sentenced in the most immediate aftermath of the FSA—in the main, as the government says, pre-FSA offenders—suggests that it did not perceive any particular unfairness in applying old law to them.

d. Finally, Congress was well aware that courts may "impose a sentence pursuant to [the] guidelines . . . without regard to any mandatory minimum sentence" under the safety-valve provisions of 18 U.S.C. § 3553(f). Nonviolent offenders with limited criminal records can escape mandatory minimums (pre- or post-FSA) and receive whatever (lower) sentence is available under applicable Guidelines if they come clean about the offense "not later than . . . the sentencing hearing." *Id.* § 3553(f)(5). Congress presumably was aware that this provision offers the traditional tool for ameliorating the severity of mandatory minimums, and that the emergency issuance of the new Guidelines required by the FSA would further ensure that this tool would continue to work as intended.

The government does not appear to dispute this, but it discounts the relevance of this relief because most "crack offenders . . . are disqualified [from safety-valve relief] by their criminal histories." U.S. Br. 39 n.10. It would be strange if this were a "problem" that Congress was endeavoring to solve, even in part, by making the FSA retroactive. Congress does not ordinarily strain for leniency toward the classes of offenders ineligible for safety-valve relief: recidivists, violent criminals, and dealers "engaged in a continuing criminal enterprise." 18 U.S.C. § 3553(f)(2)-(4). Because non-violent first timers can escape mandatory sentences entirely under the safety valve, it is not especially likely that Congress insisted on retroactivity so it could cut further the sentences of inveterate recidivists or violent criminals.

3. Section 10 of the FSA, which requires the Commission to report to Congress within five years on the impact of changes effected by the FSA, is even farther afield on the question of retroactivity.

The government argues that the offenders "*most* likely" to face sentencing "in the early *years* after the Act" are pre-FSA offenders, and thus that the FSA must apply retroactively to them so that the Commission may have something meaningful to "study." U.S. Br. 35 n.9 (emphases added). Hill similarly contends that retroactivity is required "to compile useful data," and that the Commission would confront a "heavy administrative burden" in "tracking which of the many thousands of defendants sentenced after the FSA committed their offenses before its enactment." Hill Br. 25.

It is unlikely, however, that "most" offenders sentenced for "years" after the FSA will have committed their offenses before the statute was enacted. By the government's own telling, many offenders are sentenced within *months* of being charged. U.S. Br. 30 n.7. The fact that the limitations period for drug offenses is five years (*id.* at 35 n.9) establishes only that prosecutions *can* be brought years after the offense, not that drug offenders are overwhelmingly apprehended on the eve of charges becoming time-barred. But only if crack dealers routinely escape apprehension and prosecution for nearly a lustrum—an alarming proposition were it true—would the Commission lack "useful data" on post-FSA offenses to study between 2010 and 2015. Neither the government nor Petitioners proffers a factual basis for believing this to be true.[11]

Moreover, whatever the size of the data set, there is no reason to presume that Congress contemplated a pointless study of how revised sentencing practices may affect the decisions of those who violated federal law before the revised practices were in effect. As Chief Judge Easterbrook noted, "[a] study of the [FSA]'s effects will produce meaningful results only if limited to persons whose criminal conduct occurs while the [FSA] is in force." *Holcomb*, 657 F.3d at 450 (concurring in denial of rehearing). If Section 10 provides an inference either way, accordingly, Petitioners and the government have it "backward[s]." *Ibid.*

Finally, the Commission has proved capable in the past of analyzing different groups of offenders subject to different sentencing schemes. *See, e.g.*, U.S. Sentencing Comm'n, *Memorandum: Recidivism Among Offenders with Sentence Modifications Made Pursuant to Retroactive Application of 2007 Crack Cocaine Amendment* 2-3 (May 31, 2011). Correctly interpreted to apply only to offenders who violated the law after the FSA, Section 10's directive is scarcely beyond the Commission's comprehension or ability.

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[11] Hill notes that the median time between indictment and disposition is longer (17 months) if a defendant elects to stand trial. Hill Br. 21 n.7. Since "most criminal cases do not go to trial and resolution by plea bargaining is the norm," *Blakely* v. *Washington*, 542 U.S. 296, 331 (2004) (Breyer, J., dissenting); *Brady* v. *United States*, 397 U.S. 742, 752 & n.10 (1970), it seems unlikely that Congress legislated with this statistic in mind. Even that figure confirms, though, that the Commission would have plenty to "study" if Section 10 encompasses only those crimes committed and prosecuted from 2010 until 2015.

4. The interpretation urged by Petitioners and the government, even if arguably supported by their readings of Sections 8 and 10, is sufficiently odd that Congress could not have intended it. Indeed, just last Term, the Court unanimously rejected as "absurd" the notion that Congress would make the applicability of federal criminal penalties "depend on the timing of the federal sentencing proceeding." *McNeill* v. *United States*, 131 S. Ct. 2218, 2223 (2011). Neither the government nor Petitioners cite *McNeill*. Yet their reading of the FSA produces the same incongruities that the Court found untenable in that case.

As in *McNeill*, the government and Petitioners urge that *identically* situated offenders—even those "who violated [the drug laws] on the same day and who had identical criminal histories"—"receive dramatically different federal sentences solely because" one "happened" to be sentenced after the FSA. 131 S. Ct. at 2223-24. Indeed, under this view of the FSA, crack dealers could benefit from strategic conduct that delayed sentencing—including outright misconduct, such as fugitivity—even as their co-conspirators, who promptly pleaded guilty and accepted responsibility for their crimes, received much harsher sentences. *See Holcomb*, 657 F.3d at 452 (Easterbrook, C.J., concurring in denial of rehearing); *see also United States* v. *Sidney*, 648 F.3d 904, 906 (8th Cir. 2011) (defendant engaged in machinations "all designed to delay the sentencing until after enactment and implementation of the FSA"), *pet. for cert. filed*, No. 11-8134 (Dec. 28, 2011).

The rank arbitrariness of the rule urged by the government is well illustrated by the cases at bar. According to the government, Petitioners are both entitled to the more lenient crack ratios prescribed by the FSA, even though their offenses were respectively committed in March 2007 (Hill) and August 2008 (Dorsey). But the government insists that the Seventh Circuit correctly denied relief to the defendant in *United States* v. *Bell*, 624 F.3d 803 (7th Cir. 2010), because his case was already pending on appeal by the time the FSA was enacted. *See* U.S. Br. 48. Bell committed his crack-cocaine offense in January 2009—almost *two years* after Hill's offense, and almost *six months* after Dorsey's. *Bell*, 624 F.3d at 805. The differential treatment urged by the government cannot be justified on the basis of deterrence, dessert, or any other conceivably relevant penological aim.

The government claims that "ordinary rules of finality" that Congress "respected" require this result. U.S. Br. 23, 48. But "ordinary rules of finality" look at whether cases are, well, final. Criminal prosecutions are not final if direct review or certiorari remain available. *See Clay* v. *United States*, 537 U.S. 522, 527 (2003) ("Finality attaches when this Court affirms a conviction on the merits on direct review or denies a petition for a writ of certiorari, or when the time for filing a certiorari petition expires."). Although Congress was presumably aware of this rule, the government offers no textual analysis demonstrating that Congress nonetheless intended that the FSA apply at sentencing but not on direct appeal—to *some* non-final cases, but not to others. Indeed, the hypotheticals that the government imagines in an attempt to make sense of its position—for instance, that the government may have dropped or bargained charges away in reliance on then-existing mandatory minimums, U.S. Br. 48—suggest that retroactivity should be *precluded* for cases (like Petitioners') in which guilt was adjudicated before the FSA, even if the sentencing occurred later.[12]

Because neither Section 8 nor Section 10 demonstrates that Congress authorized "inconsistent and unjust outcomes among defendants arising from the vagaries of the scheduling process," *State* v. *Reis*, 165 P.3d 980, 994 (Haw. 2007), Section 109 must be given effect. Accordingly, if penalties are to differ because of an arbitrarily selected date, the severity of the penalty should depend, as it has traditionally, upon the voluntary act of a defendant in choosing the date of his criminal conduct, not on the date of sentencing. *Cf. McNeill*, 131 S. Ct. at 2224 ("the interpretation we adopt permits a defendant to know even before he violates the law whether ACCA would apply").

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[12] The government also cites the administrative costs and judicial burden of holding new hearings for pre-FSA offenders subject to purportedly "final" sentences. U.S. Br. 48-49. Yet the government nowhere examines the costs on the other side of the ledger: the substantial expense of incarcerating an individual for *years* after a post-FSA sentence would have expired. *See, e.g.*, Ctr. on the Admin. of Crim. Law *Amicus* Br. 21-23. It is far from obvious that the expense of additional hearings—or any other procedural mechanism devised to adjust final sentences—is so considerable that the government will expend *fewer* resources keeping pre-FSA offenders in prison for the duration of an "unfair" term. The far more likely explanation is the more plausible one: Congress did not draw a nuanced line at partial retroactivity, as the government urges, but instead deferred to the traditional anti-retroactivity default in Section 109.

B. NEITHER THE FSA'S HISTORY NOR ITS PURPOSE ESTABLISHES THAT CONGRESS INTENDED THE FSA TO APPLY RETROACTIVELY.

Petitioners and the government also contend that the history and purpose of the FSA demonstrate that Congress intended partial retroactivity. They cite statements of individual legislators reflecting the widespread and forceful critique of the 100-to-1 ratio, the "intens[e] concer[n]" engendered by the racial disparities produced by the old system, and the FSA's overall purpose to "restore fairness" to cocaine sentences. U.S. Br. 46-50; Hill Br. 25-31.

None of these statements, concerns, and purposes, however, speaks directly to the question of retroactivity. And none purports to explain or construe any statutory *text* to show how its language, even if ambiguous, was actually meant to address retroactivity. This Court does not give "authoritative weight" to "legislative history that is in no way anchored in the text of the statute." *Shannon* v. *United States*, 512 U.S. 573, 583 (1994). Even considering these legislative materials for all they might be worth, however, they do not establish that Congress intended any retroactive application, much less that it did so with the clarity required to repeal Section 109's contrary command.

1. The "purposes" of the FSA do not require that it be applied to conduct that pre-dated its enactment. Because legislation requires compromise, "no legislation pursues its purposes at all costs." *Rodriguez* v. *United States*, 480 U.S. 522, 525-26 (1987). Indeed, "[d]eciding what competing values will or will not be sacrificed to the achievement of a particular purpose is the very essence of legislative choice." *Id.* at 526.

For this reason, "it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez*, 480 U.S. at 526; *see also, e.g.*, *Norfolk S. Ry. Co.* v. *Sorrell*, 549 U.S. 158, 171 (2007). In particular, while "[i]t will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully," that "is not sufficient to rebut the presumption against retroactivity." *Landgraf* v. *USA Film Prods.*, 511 U.S. 244, 285-86 (1994) (footnote omitted).

Hill contends that these principles have no relevance here because there is "no evidence" that the FSA resulted from compromise or that "members of Congress bargained over whether an old law fraught with problems should continue to apply at sentencing." Hill Br. 30-33. But *Rodriguez* and *Landgraf* prescribe interpretive rules based on the nature of the legislative process, not adjudicative facts that must be proven empirically for each new Act of Congress. In any event, it is *obvious* from the text and history of the FSA that the statute resulted from legislative compromises.

As the government notes, the Sentencing Commission spent the better part of two decades "firmly and unanimously" urging Congress to repeal the 100-to-1 ratio, and the Commission's attempt to prescribe a 1-to-1 ratio "occasioned Congress'[s] only exercise of its power to disapprove a revision of the Guidelines." U.S. Br. 8, 32. By adopting an 18-to-1 ratio, the FSA necessarily establishes that Members of Congress were not wholly persuaded that differential sentences for crack and powder cocaine are always unjustified. And the fact that Congress was willing to effect even *that* change only as part of a legislative package that increased the severity of various punishments dispels any notion that the FSA could not have resulted from compromise. By seeking to cherry-pick for retrospective application only those changes that favor defendants, Petitioners and the government would undermine, rather than serve, the package of reforms that Congress enacted.

2. Individual statements by legislators decrying the old law (*see* Hill Br. 28-30; U.S. Br. 44, 46) do not add anything of consequence to Petitioners' argument. Congress undoubtedly wished to change the law, but none of these isolated statements establishes that Congress intended the change to be *retroactive*. And like the invocation of the FSA's purpose to restore "fairness," none of these statements explains or supports the peculiar retroactivity line that Petitioners and the government urge: that Congress somehow viewed re-sentencing hearings as such a monumental burden that it preferred to retain *existing* (and "unfair") sentences for offenders subject to a final judgment, and did not even intend to reduce the *existing* (and "unfair") sentences of offenders whose direct appeals were still pending when the FSA was enacted. *See* U.S. Br. 48-50. It is not unusual that parties abuse legislative history in cases involving statutory interpretation, but rarely are the proffered snippets of the legislative record so logically disconnected from the particular interpretation urged by the litigants.

3. The sole aspect of the legislative record cited by Petitioners and the government that is remotely pertinent to the retroactivity issue is that the Senate bill ultimately enacted by Congress (S. 1789) lacks an express prohibition on retroactivity that had been contained in H.R. 265, a House bill that purportedly

served as the model for the legislation. The government touts this as evidence that "Congress considered and rejected" the earlier prohibition and opted to permit retroactivity. U.S. Br. 44; *see also* Hill Br. 27 (same). Yet even assuming this "deletion" was deliberate, it says nothing definitive about legislative intent.

In failing to include an anti-retroactivity clause, Congress merely omitted language that would do what Section 109 already does. Because Section 109 operates as if its text is "incorporated" directly into each "subsequent enactmen[t]," *Great N. Ry.*, 208 U.S. at 465, there was no reason for Congress to include *another* prohibition on retroactivity in the FSA, *see, e.g.*, *Marcello*, 349 U.S. at 309 ("[t]he deletion is nowhere explained, but it is possible that the phrase was considered unnecessary").

Indeed, if Congress advertently deleted the prohibition in order to *permit* retroactivity, one would have expected the FSA to address and permit retroactivity expressly. It defies credulity to contend that Congress somehow focused on the earlier bill's language, intentionally deleted that language in order to authorize retroactivity, and yet somehow did not think to include a single declarative sentence expressing that will in the FSA despite the obvious applicability of Section 109. In fact, since the House bill provided that "[t]here shall be no retroactive application of any portion of this Act," simply deleting the word "no" would have given Congress a running start. Only in comic opera does a task of such simplicity call for the skills of "an old Equity draftsman." W.S. Gilbert & Arthur Sullivan, *Iolanthe* act 2.[13]

C. NEITHER LENITY NOR CONSTITUTIONAL AVOIDANCE HAS ANY APPLICATION HERE.

Petitioners finally urge the Court to apply the FSA retroactively under principles of lenity and constitutional avoidance—in particular, to avoid "serious [c]onstitutional arguments implicating the guarantee of equal protection." Hill Br. 38-39; *see also* Dorsey Br. 56-59. But constitutional avoidance requires the presence of "*serious* constitutional doubts," *Clark* v. *Martinez*, 543 U.S. 371, 381 (2005) (emphasis added), and there can be no serious contention that crack-cocaine sentences involve the type of intentional discrimination by government actors that offends the equal-protection component of due process—even if the sentencing scheme produces racially disparate outcomes. *See*, *e.g.*, *Vill. of Arlington Heights* v. *Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal

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[13] QUEEN OF THE FAIRIES: And yet (unfolding a scroll) the law is clear—every fairy must die who marries a mortal!

THE LORD CHANCELLOR: Allow me, as an old Equity draftsman, to make a suggestion. The subtleties of the legal mind are equal to the emergency. The thing is really quite simple—the insertion of a single word will do it. Let it stand that every fairy shall die who *doesn't* marry a mortal, and there you are, out of your difficulty at once!

Iolanthe, *supra*, act 2.

Protection Clause."); *Washington* v. *Davis*, 426 U.S. 229, 239 (1976) (same).

The rule of lenity likewise has no application here. Lenity comes into play only when, after applying every canon of statutory interpretation, there is still "grievous ambiguity" about whether Congress intended to subject an offender to increased punishment. *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998); *see also, e.g.*, *Bifulco* v. *United States*, 447 U.S. 381, 387 (1980). Thus, the rule of lenity is not an "'overriding consideration of being lenient to wrongdoers.'" *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (quoting *Callanan*, 364 U.S. at 596). Nor does the rule apply "merely because it is *possible* to articulate a construction" that is more favorable to the defendant's position than to the prosecution's. *Moskal* v. *United States*, 498 U.S. 103, 108 (1990). Nothing about the FSA, alone or in conjunction with Section 109, "is sufficiently ambiguous . . . to permit the rule to be controlling" here. *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984).

CONCLUSION

The judgments of the court of appeals should be affirmed.

Respectfully submitted.

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March 8, 2012

AMICUS
CURIAE
BRIEF

FILED

FEB 1 - 2012

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AND
BRIEFS

Nos. 11-5683 and 11-5721

In The
Supreme Court of the United States

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EDWARD DORSEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

COREY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

◆

On Writs Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

◆

BRIEF OF FORMER UNITED STATES DISTRICT COURT JUDGES PAUL G. CASSELL AND NANCY GERTNER AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

◆

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TABLE OF CONTENTS

Page

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. All Three Branches of Government Have Acknowledged That The Prior Regime Is Wrong And Unjust 4

II. Continuing To Sentence Under The Pre-FSA Mandatory Minimums Is Inconsistent With The Purposes of Sentencing Under 18 U.S.C. § 3553(a) 8

III. Continuing To Sentence Under The Pre-FSA Mandatory Minimums Fundamentally Undermines The Guidelines Regime 11

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

Hamm v. City of Rock Hill, 379 U.S. 306 (1964) 9

Kimbrough v. United States, 552 U.S. 85 (2007) 5

United States v. Acoff, 634 F.3d 200 (2d Cir. 2011) 7

United States v. Angelos, 345 F. Supp. 2d 1227 (D. Utah 2004) 7

United States v. Douglas, 746 F. Supp. 2d 220 (D. Me. 2010) 7

United States v. Holcomb, 657 F.3d 445 (7th Cir. 2011) 11

United States v. Parks, No. 8:10CR225, 2010 WL 5463743 (D. Neb. Dec. 28, 2010) 7

United States v. Vasquez, No. 09-CR-259 (JG), 2010 U.S. Dist. LEXIS 32293 (E.D.N.Y. Mar. 30, 2010) 12

Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653 (1974) 2

STATUTES

1 U.S.C. § 109 2

18 U.S.C. § 3553(a) 4, 8, 9, 11

U.S.S.G. § 5G1.1 11

Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) ....*passim*

TABLE OF AUTHORITIES – Continued

Page

RULES

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.6(a) 1

OTHER AUTHORITIES

156 Cong. Rec. H6196-01, 2010 WL 2942883 4

Statement on Behalf of the Judicial Conference of the United States Before the H. Judiciary Subcomm. on Crime, Terrorism & Homeland Security, 19 FED. S. REP. 344 (2007) 7

U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007) 4, 6

U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002) 5

U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995) 5

U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997) 5

INTEREST OF *AMICI CURIAE*[1]

Amici curiae are two former United States District Court Judges who have sentenced defendants under the mandatory-minimum provisions of the Anti-Drug Abuse Act of 1986 ("1986 Act"), Pub. L. No. 99-570, 100 Stat. 3207 (1986). Both have written opinions and articles expressing their deep concerns about the unfairness of the onerous mandatory-minimum penalties for non-violent drug offenders and the racial disparities they have engendered. Both are now law professors who continue to research and write on the subject of sentencing and criminal justice policy.

Judge Paul G. Cassell was a judge of the United States District Court for the District of Utah from 2002 until 2007, and served on the Judicial Conference's Committee on Criminal Law during a time when it recommended changes in the cocaine sentencing guidelines. He resigned the bench and joined the faculty of the S.J. Quinney College of Law at the University of Utah. Judge Nancy Gertner was a judge of the United States District Court for the District of Massachusetts from 1994 until 2011. She resigned the bench in September of 2011 to join the faculty of the Harvard Law School.

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici curiae* and counsel, made any monetary contribution towards the preparation and submission of this brief. *See* SUP. CT. R. 37.6. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certifies that counsel of record for both parties received timely notice of *amici curiae*'s intent to file this brief and have consented to its filing by letter on file with the Clerk's office. *See* SUP. CT. R. 37.6(a).

◆

SUMMARY OF ARGUMENT

Congress enacted the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) ("FSA"), not simply to change the drug quantities needed to trigger the 5-, 10-, and 20-year mandatory-minimum penalties for offenses involving crack cocaine imposed by prior law. Congress enacted the FSA to correct the acknowledged errors of the 1986 Act. The FSA represents express conclusions that sentencing under prior law was unjust, that it was mistaken from the outset, that it did not fulfill any of the purposes of sentencing, and that it was the source of substantial racial disparity in federal sentencing.

Consistent with those conclusions, Congress took steps to implement the FSA as quickly as possible, directing the United States Sentencing Commission to amend the relevant sentencing guidelines within ninety days to conform them to the provisions of the new statute. While Congress did not explicitly indicate application to pre-enactment conduct, the general saving statute, 1 U.S.C. § 109, plainly does not apply where – as here – the will of Congress either "expressly" or by "fair implication" is clear. *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974). As petitioners and the Solicitor General have argued, the text and structure of the FSA, together with its history and purposes, make apparent that Congress intended the FSA's revised mandatory minimums to be effective immediately in sentencing proceedings following its enactment.

As former U.S. District Court Judges, who have sentenced many individuals and have devoted considerable attention to mandatory-minimum penalties, we can attest that no other interpretation is consistent with criminal justice policy, the purposes of sentencing, or indeed, the structure the Guidelines regime. Concluding, as the Seventh Circuit did, that the FSA applies only to those whose crime occurred after the date of its enactment will dramatically compound the acknowledged unfairness of the 1986 Act. It will oblige federal district judges for five years after the FSA's enactment (the statute of limitations for these offenses) to perpetuate an injustice recognized not only by Congress, but by the Executive (through the Department of Justice), the Sentencing Commission, and the bench.

The Seventh Circuit's ruling exacerbates the very unwarranted disparities with which the Sentencing Reform Act was concerned – the sentencing of offenders to different terms of imprisonment, when their conduct was essentially identical – and continues racial disparities all three branches of government have found repugnant. And finally, continuing to apply repudiated mandatory-minimum penalties in the face of what in many cases will be drastically lower applicable Guidelines ranges will severely undermine judges' attempts to apply § 3553(a), and will damage the legitimacy of the sentencing process.

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ARGUMENT

I. ALL THREE BRANCHES OF GOVERNMENT HAVE ACKNOWLEDGED THAT THE PRIOR REGIME IS WRONG AND UNJUST

The preamble to the FSA notes that the Act was intended to "restore fairness to Federal cocaine sentencing." FSA Pmbl., 124 Stat. 2372. The obvious implication is not only that the FSA introduced a new regime, but that the previous sentencing regime was unfair. Indeed, when the FSA was passed, members of Congress expressly noted that the old crack/powder cocaine disparity was wrong, even "contrary to our fundamental principles of equal protection under the law." 156 Cong. Rec. H6196-01, 2010 WL 2942883 (daily ed. July 28, 2010) (statement of Rep. Clyburn).

The FSA followed "almost universal criticism" of the sentencing disparity between penalties for powder cocaine offenses and those for crack. U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (May 2007) ("2007 Report"). In a 1995 report to Congress, the Sentencing Commission noted that the adoption of the 100-to-1 ratio in the treatment under federal law of "two easily convertible forms of the same drug" produced a variety of "extreme anomalies in sentencing." U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 197 (Feb. 1995) ("1995 Report"). A major trafficker in powder cocaine could receive a shorter prison sentence than the street-level dealer who bought from that trafficker and converted the powder cocaine to crack. *See Kimbrough v. United States*, 552 U.S. 85, 95 (2007). More troubling, the impact of these sentencing disparities fell disproportionately on racial minorities. 1995 Report 192. In 1997, the Commission reiterated "firmly and unanimously" its conclusion that the 100-to-1 ratio was unjustifiable. U.S. Sentencing Comm'n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 2 (Apr. 1997) ("1997 Report"). The 100-to-1 disparity resulted in a widespread "perception of unfairness and inconsistency" in federal sentencing. *Id.* at 8.

In 2002, the Commission stated even more clearly that the initial sentencing ratio had been enacted in error. It explained that "[t]he 100-to-1 drug quantity ratio was established based on a number of beliefs" about the dangers of crack cocaine "that more recent research and data no longer support." U.S. Sentencing Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 91 (May 2002) ("2002 Report"). Under the circumstances, the Commission again concluded that the differential is "unjust" and perpetuated racial disparities. *Id.* at 100, 103.

By 2007, the Commission determined that "the problems associated with the 100-to-1 drug quantity ratio" were "so urgent and compelling" that it would address some of them on its own, but recognized that this was an interim solution and that legislative action was necessary. 2007 Report 9. Further, the Commission noted that the "100-to-1 drug quantity ratio significantly undermines the various Congressional objectives set forth in the Sentencing Reform Act." 2007 Report 8.

The Commission urged Congress to include in any ameliorative legislation a grant of "emergency amendment authority" to permit the Commission to immediately incorporate the changes in the federal Sentencing Guidelines, and to minimize the lag between statutory and Guidelines modifications. 2007 Report 9. Plainly responding to the urgency of that recommendation, and finally responding to the Commission's conclusions, Congress adopted the FSA, and in particular § 8 of the Act. Section 8 instructs the Commission to promulgate new guidelines consistent with the FSA "as soon as practicable" and "not later than 90 days after the enactment of the Act." § 8, 124 Stat. 2372.

The Commission's concerns about the 1986 Act have been echoed by federal judges from one end of the country to the other. As Judge Cassell noted in testimony before the House Judiciary Committee, speaking about mandatory-minimum penalties in general, such penalties inflict damage on the "logic and rationality in our nation's federal courts."

Statement on Behalf of the Judicial Conference of the United States Before the H. Judiciary Subcomm. on Crime, Terrorism & Homeland Security, 19 FED. S. REP. 344, 344 (2007) (statement of J. Paul G. Cassell). Mandatory-minimum sentencing schemes can produce sentences in individual cases that are "unjust, cruel, and even irrational." *United States v. Angelos*, 345 F. Supp. 2d 1227, 1230 (D. Utah 2004).

More recently, in addressing the scope of the FSA, sentencing judges have been unable to articulate any legitimate reason why Congress would want "to continue to require that courts impose unfair and unreasonable sentences on those offenders whose cases are still pending." *United States v. Acoff*, 634 F.3d 200, 205 (2d Cir. 2011) (Lynch, J., concurring); *see also United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010) ("What possible reason could there be to want judges to *continue* to impose new sentences that [Congress has declared to be unfair] over the next five years while the statute of limitations runs?"); *United States v. Parks*, No. 8:10CR225, 2010 WL 5463743, at *7 (D. Neb. Dec. 28, 2010) (noting "[t]he government has not identified any valid congressional interest that would be served by continuing to apply the now discredited and repudiated 100-to-1 ratio to those defendants who would now be categorized as minor crack offenders[,]" and deciding that to "continue to sentence defendants under a formula that is uniformly regarded as unfair and unjust" [would] "frustrate the expressed congressional goals of remedying racially discriminatory impact[.]").[2]

The Executive, too, has acknowledged these fundamental concerns. Most notably, the United States has commendably recognized in this litigation that the FSA properly applies immediately in sentencing proceedings following its enactments.

II. CONTINUING TO SENTENCE UNDER THE PRE-FSA MANDATORY MINIMUMS IS INCONSISTENT WITH THE PURPOSES OF SENTENCING UNDER 18 U.S.C. § 3553(A)

Amici were charged with sentencing individuals under the mandate and purposes of sentencing set forth in 18 U.S.C. § 3553(a). Our former colleagues continue to face that solemn task on a daily basis. The position adopted by the Seventh Circuit – that, for several years to come, the FSA should remain inapplicable to many individuals sentenced after its enactment – is wholly inconsistent with the purposes of sentencing under § 3553(a). Congress has acknowledged as much in adopting the findings of the Sentencing Commission over the past two decades, and in its deliberations on the FSA.

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[2] These are but three examples. During the first year after the enactment of the FSA, dozens of district courts across the country held that the statute's ameliorative provisions apply to all defendants sentenced after the FSA's enactment, regardless of when the offense conduct occurred.

The FSA represents Congress's assessment that the prior penalties are no longer needed to deter offenders. No potential criminal will decide to commit a crime because of the chance that even if he gets caught, one day the legislature might reduce the punishment for that crime. Likewise, with respect to incapacitation, Congressional action in reducing the mandatory penalties suggests that *less* punishment will suffice to protect society. And the FSA underscores Congress's determination that the old penalties are inconsistent with a just sentence that is "sufficient, but not greater than necessary." 18 U.S.C. § 3553(a). It reflects, in effect, a new scientific and social view of crack cocaine – that it is not as much a threat as once feared, that the penalties need not be as severe, and even that the prior penalties were disproportionate to the conduct when compared to the penalties for powder cocaine. In short, there is no basis to support imputing to Congress any intention to "inflict[ ] punishment at a time when it can no longer further any legislative purpose[.]" *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964).

Just as important, and based on our first-hand experience on the bench, continuing an unwarranted crack/powder disparity will have a corrosive impact on the deterrent effect of all federal criminal sentences. Many Americans, particularly in minority communities, have come to regard the federal criminal justice system with suspicion because of the ill-founded crack/powder disparity. These skeptics believe that the ratio is racist and that the resulting lengthy sentences are unjust. That harmful perception will continue and, indeed, be strengthened if this Court refuses to immediately apply Congress's corrective action.

To be effective, the federal criminal justice system must have the full trust of the public. The system cannot work unless citizens willingly report crimes to police, testify as witnesses before grand juries and at trial, and serve on juries that must unanimously determine guilt. The crack/powder disparity has already done serious damage to public confidence in federal law enforcement, particularly in the high-crime inner-city communities that most desperately need policing efforts. These costs to the system far outweigh whatever marginal incapacitative or other advantage might seemingly stem from applying to crack dealers the full measure of a now-discredited sentencing regime.

Congress recognized these serious problems in enacting the FSA. The Court should hasten to implement Congress's corrective action before any further damage is done.

III. CONTINUING TO SENTENCE UNDER THE PRE-FSA MANDATORY MINIMUMS FUNDAMENTALLY UNDERMINES THE GUIDELINES REGIME

Section 8 of the FSA directs the Sentencing Commission to amend the relevant guidelines within 90 days to conform them to the provisions of the new statute. The Commission did so. The new sentencing guidelines are applicable at all sentencing hearings that occur after they were promulgated, regardless of when the crimes for which the sentences are being imposed were committed. 18 U.S.C. § 3553(a)(4)(ii). Unless the FSA's revised mandatory-minimum penalties are also applied, these defendants will receive sentences higher than dictated by the guidelines that Congress urged the Commission to adopt and intended to apply to these defendants. The results, as Judge Posner has recognized, are "perverse." *United States v. Holcomb*, 657 F.3d 445, 462 (7th Cir. 2011) (Posner, J., dissenting).

Moreover, the Seventh Circuit's approach introduces the anomaly that major crack traffickers being sentenced for pre-FSA conduct will get the benefit of the ameliorated crack/powder disparity, while minor ones being sentenced for pre-FSA conduct will not. That is because the ameliorative Guidelines amendments mandated by the FSA will determine the sentencing ranges of those trafficking in enough crack to make their Guidelines ranges fall *above* the old mandatory minimums, whereas the old mandatory minimums will be the Guidelines sentence for those minor offenders whose Guidelines ranges fall *below* the old mandatory minimums. *See* U.S.S.G. § 5G1.1.

Or consider the following: an offender, in one courtroom, who distributed 7 grams of crack the day after the FSA's enactment but not sentenced until two years later would get the benefit of the FSA. He would be subject to an ameliorated Guidelines sentence – and no mandatory minimum. But an offender, in the next courtroom, who distributed the same quantity the day before the enactment would get no benefit, and would be sentenced to the old mandatory minimum. Nothing in the FSA legitimizes this result.

Anytime a penalty is ameliorated, a line must be drawn between those who receive the benefit of a lower penalty and those who do not. There are sound reasons for leaving final judgments undisturbed. But there is no persuasive reason for applying different penalties to individuals not yet sentenced, particularly since doing so perpetuates the injustice Congress was attempting to remedy.

More poignant, as to the defendant subject to that mandatory-minimum penalty that everyone acknowledges is unfair. Judge John Gleeson of the Eastern District of New York described the reaction best:

> The absence of fit between the crude method of punishment [a five-year mandatory minimum] and the particular set of circumstances before me was conspicuous. * * * [W]hen I imposed sentence on the weak and sobbing [defendant], everyone present, including the prosecutor, could feel the injustice.

United States v. Vasquez, No. 09-CR-259 (JG), 2010 U.S. Dist. LEXIS 32293, at *14-15 (E.D.N.Y. Mar. 30, 2010). The signatories to this brief, like their colleagues still on the bench, well understand that feeling.

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CONCLUSION

For the foregoing reasons, and for those set forth in the briefs filed on behalf of petitioners, this Court should reverse the decisions of the U.S. Court of Appeals for the Seventh Circuit.

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AMICUS CURIAE BRIEF

Supreme Court, U.S.
FILED

FEB - 1 2012

OF THE CLERK

Nos. 11-5683 and 11-5721

IN THE

Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

COREY HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writs of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ..... *ii*

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. SECTION 109 PRECLUDES ONLY TECHNICAL ABATEMENT AND SHOULD NOT BE READ TO FRUSTRATE THE IMMEDIATE APPLICATION OF AMELIORATIVE STATUTES 3

A. Technical abatement was a loophole in the common law. 3

B. Section 109 was only intended to close the technical-abatement loophole as part of the codification effort. 6

II. SECTION 109 DOES NOT APPLY TO THE FAIR SENTENCING ACT OF 2010... 9

A. Ameliorative amendments are not barred by § 109, and Supreme Court precedent to the contrary is based on a misconstruction of technical abatement. 9

B. Application of the Fair Sentencing Act to ongoing proceedings is otherwise consistent with this Court's jurisprudence. 12

C. The Seventh Circuit's rule, if applied broadly, will impose significant social costs, contrary to Congress's intent. 15

CONCLUSION 17

TABLE OF AUTHORITIES

CASES Page

Bell v. *Maryland*, 378 U.S. 226 (1964) 4

Bradley v. *United States*, 410 U.S. 605 (1973) 3, 5, 10

De La Rama S.S. Co. v. *United States*, 344 U.S. 386 (1953) 14

Dobbert v. *Florida*, 432 U.S. 282 (1977) 12, 13, 14

Fletcher v. *Peck*, 10 U.S. (6 Cranch) 87 (1810) 15

Great N. Ry. Co. v. *United States*, 208 U.S. 452 (1908) 15

Hamm v. *Rock Hill*, 379 U.S. 306 (1964) 8, 9, 10

Kimbrough v. *United States*, 552 U.S. 85 (2007) 16

Lockhart v. *United States*, 546 U.S. 142 (2005) 8

Massey v. *United States*, 291 U.S. 608 (1934) (per curiam) 4

People v. *Oliver*, 134 N.E.2d 197 (N.Y. 1956) 14, 16

R. v. *M'Kenzie*, 168 Eng. Rep. 881 (Ct. Cr. Cas. Rev. 1820) 3

Tapia v. *United States*, 131 S. Ct. 2382 (2011) 13

United States v. *Chambers*, 291 U.S. 217 (1934) 4, 5, 12

United States v. *Douglas*, 746 F. Supp. 2d 220 (D. Me. 2010) 15, 16

United States v. *Fisher*, 646 F.3d 429 (7th Cir. 2011) 14, 16

United States v. *Tynen*, 78 U.S. 88 (1870)... 5, 12

Warden v. *Marrero*, 417 U.S. 653 (1974) 2, 10, 11

TABLE OF AUTHORITIES—continued

Page

Weaver v. *Graham*, 450 U.S. 24 (1981) 12, 13

STATUTES

Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 10
Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372, 2374 .... 14, 16
16 Stat. 431, 431–32 (1871) 7
61 Stat. 635 (1947) 9
1 U.S.C. § 109 .... *passim*
18 U.S.C. 3006A 1
18 U.S.C. § 3553(a)(2) 14

LEGISLATIVE HISTORY

Cong. Globe, 41st Cong., 2d Sess. 2464 (1870) 7, 8
Cong. Globe, 41st Cong., 3d Sess. (1871) 7
H.R. Rep. No. 80-251 (1947) 9
H.R. 1351, 41st Cong. (3d Sess. 1871) 7

SCHOLARLY AUTHORITIES

Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 Law & Contemp. Probs. 401 (1958) 14
John P. Mackenzie, *Hamm v. City of Rock Hill and the Federal Savings Statute*, 54 Geo. L.J. 173 (1965) 7, 8
Note, *Today's Law & Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120 (1972) 4, 5

TABLE OF AUTHORITIES—continued

Page

S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1 (2009) 14

OTHER AUTHORITY

Model Penal Code § 1.02(2) (2001) 14

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit professional bar association that represents the nation's criminal defense attorneys. Its mission is to promote the proper and fair administration of criminal justice and to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a membership of approximately 10,000 direct members and an additional 35,000 affiliate members in all 50 states and 30 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL has frequently appeared as *amicus curiae* before the United States Supreme Court, the federal courts of appeal, and the highest courts of numerous states.

The National Association of Federal Defenders ("NAFD") was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. 3006A, and the Sixth Amendment to the Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

The broad application of the Fair Sentencing Act is vital to the interests of NACDL and NAFD's members, as is an interpretation of the General Saving Statute, 1 U.S.C. § 109, that is narrow and limited to the purpose of preventing technical abatement.[1]

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in

SUMMARY OF ARGUMENT

Section 109 of title 1, U.S. Code, precludes only "technical abatement," which operates to deprive the government of the power to continue ongoing prosecutions. Under the common law rule of technical abatement, an amended statute is regarded as effectively repealed through repeal and re-enactment, and the government's power to prosecute pending crimes is thereby extinguished. In 1871, Congress was engaged in an effort to re-enact U.S. law in codified form, which became the Revised Statutes of 1874. What is now 1 U.S.C. § 109 was adopted at that time for the limited purpose of preventing widespread technical abatement, which otherwise would have resulted from the re-enactment of U.S. law in codified form.

This Court in *Warden* v. *Marrero*, 417 U.S. 653 (1974), departed from the narrow purpose of § 109. In an alternate holding that was unnecessary to the decision, the Court misconstrued technical abatement to preclude application of ameliorated penalties to pending proceedings. This Court should take the occasion in this case to repudiate the discussion of § 109 in *Marrero*, on which the court below wrongly relied. Section 109 does not prevent the application of the Fair Sentencing Act to pending proceedings because the application of an ameliorated penalty does not come within the technical abatement rule. Deciding otherwise would misconstrue § 109 and

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part and that no entity or person, aside from *amici curiae*, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Supreme Court Rule 37.2(a), *amici curiae* certifies that counsel of records for both parties received timely notice of *amici curiae's* intent to file this brief and have consented to its filing in letter on file with the Clerk's office.

frustrate the intent of Congress in passing the Fair Sentencing Act.

ARGUMENT

I. SECTION 109 PRECLUDES ONLY TECHNICAL ABATEMENT AND SHOULD NOT BE READ TO FRUSTRATE THE IMMEDIATE APPLICATION OF AMELIORATIVE STATUTES

A. Technical abatement was a loophole in the common law.

Technical abatement is a common law rule that entirely deprives the government of the power to prosecute offenses committed prior to a statutory amendment. As this Court recognized in *Bradley* v. *United States*, 410 U.S. 605, 608 (1973), a classic example of technical abatement is the case of *R.* v. *M'Kenzie*, 168 Eng. Rep. 881 (Ct. Cr. Cas. Rev. 1820). The defendants were convicted of "feloniously stealing . . . , on the 11th of July, 1820, twenty-three yards of lace, value one pound three shillings . . . ." *Id.* However, on July 25, 1820, Parliament amended the grand larceny statute, reducing the penalty from death to life imprisonment. The English court held that the defendants could not be held liable under *either* statute—the new one because it was enacted after the crime and the old one because it had been effectively repealed. *Id.*

The technical abatement that occurred in *M'Kenzie* is best understood as a counterintuitive loophole in the common law that is different from classic abatement. Abatement—as distinguished from technical abatement—is the "universal common-law rule that when the legislature repeals a criminal statute or otherwise removes the State's condemnation from conduct that was formerly deemed criminal, this action requires the dismissal of a pending criminal proceeding charging such conduct." *Bell* v. *Maryland*, 378 U.S. 226, 230 (1964). Abatement applies purely to "unqualified repeal of a criminal statute." Note, *Today's Law & Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation*, 121 U. Pa. L. Rev. 120, 121 (1972). Abatement *per se* is a sound legal principle, for it makes little sense to continue to hold individuals liable for behavior that is no longer condemned by the law as culpable. See *id.* at 122 n.16 (noting that it is "logical and reasonable" to conclude that an unqualified repeal is a legislative "determination that that the former legislation was no longer socially necessary or desirable").

Classic abatement doctrine "has also been consistently recognized and applied by this Court," especially in the criminal context. *Bell*, 378 U.S. at 231 n.2; accord *Massey* v. *United States*, 291 U.S. 608, 609 (1934) (per curiam); *United States* v. *Chambers*, 291 U.S. 217, 223 (1934). In *Chambers*, the Court affirmed dismissal of a prosecution brought under the National Prohibition Act. 291 U.S. at 222–23. The indictment was filed on June 5, 1933, six months before enactment of the Twenty-First Amendment on December 5 of that year. *Id.* at 221–22. On December 6, "Chambers then filed a plea in abatement, and . . . [t]he District Judge sustained the contention and dismissed the indictment." *Id.* This Court affirmed the dismissal because "[t]he continuance of the prosecution of the defendants . . . would involve an attempt to continue the application of the statutory provisions after they had been deprived of force." *Id.* at 222–23. The Court stated that "it has long been settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute." *Id.* at 223 (internal quotation marks omitted) (quoting *Yeaton* v. *United States*, 9 U.S. (5 Cranch) 281, 283 (1809) (Marshall, C.J.)).

Technical abatement, by contrast, occurs because "[a]t common law, . . . abatement by repeal included a statute's repeal and re-enactment with different penalties." *Bradley*, 410 U.S. at 607–08 (citing 1 J. Sutherland, Statutes and Statutory Construction § 2031 n.2 (3d ed. 1943)); see also Note, *supra*, at 123 ("[R]epeal also historically include[d] the situation of repeal and re-enactment with different penalties . . . ."). For technical abatement, it made no difference if the new penalties were harsher or more lenient. *Bradley*, 410 U.S. at 607–08. Thus, if a legislature replaced the penalty for a crime by repealing the old statute and simultaneously replacing it with a new one—even one that "covers the whole subject of the first," *United States* v. *Tynen*, 78 U.S. 88, 92 (1870)—the technical abatement doctrine would entirely deprive the government from proceeding with pending prosecutions. The amendment of a statute was interpreted to express "the legislative will . . . that no further proceedings be had under the [A]ct repealed." *Id.* at 95. As a result, all prosecutions of offenses committed prior to the amending statute had to cease. "The continued prosecution necessarily depends upon the continued life of the statute which the prosecution seeks to apply." *Chambers*, 291 U.S. at 223. This was precisely the scenario in *M'Kenzie*, and precisely the scenario that § 109 was enacted to correct. The power to prosecute such offenses had to be preserved.

B. Section 109 was only intended to close the technical-abatement loophole as part of the codification effort.

The General Saving Statute provides, in relevant part:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109. On its face, the General Saving Statute only operates (absent contrary congressional intent, express or implied, in the statute at hand) to preserve a penalty that has already been "incurred" and only when the prior statute has been "repealed." Amici NACDL and NAFD endorse the arguments of the parties that the Fair Sentencing Act demonstrates such a contrary intent and the arguments of petitioners that § 109, by its plain language, does not operate to preserve the prior mandatory minimums in any event. The argument presented here is that the General Saving Statute does not apply for yet another, historical reason—that the immediate application of the FSA's penalties to ongoing prosecutions does not create what would at common law be considered a technical abatement. Technical abatement is the complete deprivation of the power to prosecute, not an amelioration of penalties.

The above-quoted portion of § 109 was originally enacted—verbatim—in 1871 as § 4 of a larger bill entitled "An Act Prescribing the form of the enacting and resolving clauses of acts and resolutions of Congress, and rules for the construction thereof." H.R. 1351, 41st Cong. (3d Sess. 1871). The bill was requested by the Committee on Revision of Laws of the United States, Cong. Globe, 41st Cong., 2d Sess. 2464 (1870), and was primarily concerned with semantic matters, such as prescribing the exact phrase to be used in the enacting clause of bills, or specifying that masculine pronouns can be assumed to refer to both men and women. *Id.* at §§ 1–2; 16 Stat. 431, 431–32 (1871).

The bulk of the debate in Congress focused on the semantic issues, with no discussion of § 4 itself. See Cong. Globe, 41st Cong., 2d Sess. 2464–67 (recording the floor debate in the House); Cong. Globe, 41st Cong., 3d Sess. 775–78 (1871) (recording the floor debate in the Senate); see generally John P. Mackenzie, *Hamm v. City of Rock Hill and the Federal Savings Statute*, 54 Geo. L.J. 173, 177–80 (1965). The overall purpose of the bill, though, was to "save a good deal of verbiage in the statutes," to "simplify the phraseology of our statutes," and to "simplif[y] the mode of enactment." Cong. Globe, 41st Cong., 3d Sess. 775 (statement of Senator Trumbull). The original sponsor of the bill, Congressman Poland, maintained that "[t]he object is merely to secure a better style for bills and to dispense with the tautology which is in such common use." Cong. Globe, 41st Cong., 2d Sess. 2465.

Key to understanding § 109 is that it was introduced to assist in the effort to codify the laws of the United States. See generally Mackenzie, *supra*, at 176. The Commission assigned to this "mammoth task"—comprised of commissioners appointed by the President and confirmed by the Senate—was to issue reports with "proposed *reenactments* of the laws into code arrangements," and "suggest to Congress such . . . statutes or parts of statutes as, in their judgment, ought to be repealed, with their reasons for such repeal." *Id.* (emphasis added). The effort culminated in the adoption of the original Revised Statutes, in 1874. In this light, it is clear why the general saving clause was required—*to prevent a wave of technical abatements as a result of the reenactment of United States criminal law as part of the codification process.*

The floor debates confirm this interpretation of § 109. As Congressman Hoar put it, "the scope of this bill [is] to construe ordinarily recurring words and phrases *in existing laws*." Cong. Globe, 41st Cong., 2d Sess. 2465 (emphasis added). Congressman Hoar continued: "It seems, with the exception of the provision about the enacting clause, this is a bill for construing the phrases in *existing* laws, *not laws to be hereafter enacted*." *Id.* (emphases added). Indeed, the Senate sponsor, Lyman Trumbull, explicitly recognized that "[w]e cannot pass a law that will bind other Congresses." Cong. Globe, 41st Cong., 3d Sess. 775; cf. *Lockhart* v. *United States*, 546 U.S. 142, 149-50 (2005) (Scalia, J., concurring) (pointing out the "invalidity of [any] express-reference provision" that "attempt[s] to burden the future exercise of legislative power").

This Court recognized in *Hamm* v. *Rock Hill*, 379 U.S. 306, 314 (1964), that the limited purpose of § 109 was "to obviate mere technical abatement," such as what would result from the re-enactment of all criminal law during codification or the amendment of a law to increase its penalty. *Id.* It was not intended to bind the hands of future Congresses in prospectively applying reduced penalties. Indeed, Congress re-enacted into positive law § 109 itself in 1947, 61 Stat. 635 (July 30, 1947)—this time, as part of an "ambitious" program "having as [its] ultimate purpose the enactment into positive law of all the titles of the United States Code." H.R. Rep. No. 80-251, at 2 (1947). The enactment into positive law would have presented the same risk of a wave of technical abatements, just as did the codification effort in the 1870s. Section 109 was enacted—and re-enacted—to prevent this from happening.

Neither of the two purposes of the General Saving Statute—preventing technical abatement and simplifying the enactment process for future legislators—justifies using it to prevent the application of ameliorative statutes in ongoing prosecutions. Indeed, it would be the height of irony to use a statutory provision meant to simplify the lives of future legislators to bind their hands instead. The narrow purpose of § 109 was to preserve the powers of the government to punish defendants in cases of technical abatement, not to leave offenders subject to an amended law's penalties deemed by Congress to be unfair and unjust.

II. SECTION 109 DOES NOT APPLY TO THE FAIR SENTENCING ACT OF 2010

A. Ameliorative amendments are not barred by § 109, and Supreme Court precedent to the contrary is based on a misconstruction of technical abatement.

In *Hamm,* this Court recognized that § 109 was created for the limited purpose of rebutting the presumption of technical abatement, thereby preserving the power to prosecute ongoing proceedings. 306 U.S. at 312-14. "It was meant to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1871. There a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution." *Id.* at 314. Section 109 preserves the power to prosecute ongoing proceedings in cases of repeal and re-enactment but does not extend to preserve prior penalties. In *Hamm*, this meant that § 109 would not preserve a conviction inconsistent with the newly enacted Civil Rights Act of 1964. The Civil Rights Act "work[ed] no such technical abatement." *Id.* (Hence, this Court held, the Supremacy Clause invalidated the state convictions at issue there, which had not become final when the Civil Rights Act went into effect.) Here, § 109 operates to preserve the power to continue ongoing prosecutions, thereby rebutting the presumption of technical abatement. But that is the extent of its role. It cannot also operate to hamstring a later Congress intending to apply reduced penalties to ongoing prosecutions. Not only would this contravene Congress's intent in enacting the FSA, but it would work an extension of §109 beyond its original scope.

This Court in *Bradley* read the express savings clause of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236, against its explication of common law abatement to find the law's favorable parole eligibility rules to be inapplicable to defendants sentenced after its enactment but whose offenses occurred prior to that date. 410 U.S. 605. In a brief concurring opinion, two Justices opined that they would rest the decision on the additional ground that § 109 required the same result. *Id.* at 611-12.

The Court examined the parole provisions of the 1970 Act in another context in *Marrero*, 417 U.S. 653 (1974). In an alternate holding that was unnecessary to the decision, the Court extended the *Bradley* concurrence and departed from the limited purpose of § 109. 417 U.S. at 659-64. At issue was whether defendants convicted under a narcotics statute that prevented offenders from seeking parole could take advantage of the later statute providing parole eligibility. As noted, the later statute included its own savings clause, and the Court held that the clause prohibited application of the ameliorated penalties. *Id.* at 657-59. But in an alternate holding, this Court went on to address whether § 109 independently prohibited the application of the ameliorative law. The Court correctly noted that the purpose of § 109 was to "abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had not reached final disposition in the highest court authorized to review them.'" *Id.* at 660 (quoting *Bradley*, 410 U.S. at 607). But the Court went on to improperly expand the scope of §109.

The Court in *Marrero*, citing the same two nineteenth century cases as *Bradley* without conducting any new historical analysis, misconstrued technical abatement. It found that if defendants convicted under the repealed statute received the benefits of the ameliorative law, their "prosecution would 'technically' abate under the common-law rule." *Id.* at 660 n.11. As a result, the Court held that the General Saving Statute prevented application of the ameliorative law and thereby prohibited parole eligibility. *Id.* at 659. But applying an amended sentence to reduce its severity does not implicate technical abatement; rather, technical abatement results in the dismissal of the indictment because the government is deprived of the power to prosecute offenses committed prior to the amending statute.

Nowhere is abatement doctrine properly understood to include the mere reduction of a penalty. Technical abatement means that "there was no offence remaining for the court to punish in virtue of that section." *Tynen*, 78 U.S. at 95. It necessarily extinguishes the power of the prosecutor to proceed. "[I]f the prosecution continues the law must continue to vivify it." *Chambers*, 291 U.S. at 226.

Based on its misconstruction of the technical abatement doctrine, the Court in *Marrero* expanded the scope of § 109 to preclude application of ameliorated penalties. This Court should acknowledge and repudiate the error made in *Marrero* and confine the scope of § 109 to its original purpose of reversing the presumption of technical abatement, understood as "the legislative will . . . that no further proceedings be had under the [A]ct repealed." *Tynen*, 78 U.S. at 95.

B. Application of the Fair Sentencing Act to ongoing proceedings is otherwise consistent with this Court's jurisprudence.

In cases where § 109 does not apply, this Court has never hesitated to apply ameliorative statutes to pending proceedings. See *Dobbert* v. *Florida*, 432 U.S. 282, 294-95 (1977) (rejecting challenge to application of changed death penalty law to pending cases, because "[t]he Florida legislature enacted the new procedure specifically to provide . . . defendants with more, rather than less, judicial protection"); cf. *Weaver* v. *Graham*, 450 U.S. 24, 37–38 (1981) (Rehnquist, J., concurring) (finding that ameliorative sentence-adjustment laws could apply immediately to all prisoners, but that the challenged statute was, on balance, not ameliorative). At issue in *Weaver* was a Florida statute that changed the calculation of a prisoner's "gain time for good behavior." 450 U.S. at 25-26, 34 n.20. In addressing an Ex Post Facto Clause challenge to the law, this Court squarely held that immediately applying the new statute—which lacked a saving clause—necessarily applied retroactively because it would inevitably affect prisoners who committed their crimes before the effective date of the statute. *Id.* at 27 n.4, 31–32. Although the Court struck down the Ex Post Facto portion of the statute in *Weaver* as it applied to the petitioner, it did so specifically because it was not ameliorative. *Id.* at 34–35; see *id.* at 36 n.22 ("[O]nly the *ex post facto* portion of the new law is void as to petitioner, and therefore any severable provisions which are not *ex post facto* may still be applied to him"); see also *id.* at 37–38 (Rehnquist, J., concurring) (finding "this case a close one" and stating that had the statute *in toto* been ameliorative, its immediate application should be upheld); *Dobbert*, 432 U.S. at 292 n.6 (emphasizing that the ameliorative nature of a statute is an "independent bas[i]s" for upholding immediate application of a criminal law). The logic of *Weaver* and *Dobbert* should apply with equal force here. The FSA is plainly ameliorative, it does not contain a specific saving clause, and § 109 is no bar. The ameliorative provisions of the Fair Sentencing Act should therefore apply at every sentencing taking place on or after August 3, 2010, the date the Act went into effect.

This result is particularly important in the criminal law context, where congressional reduction of a penalty represents a legislative recognition that the previous penalty no longer fulfills the purposes of punishment and sentencing, including "retribution, deterrence, incapacitation, and rehabilitation." *Tapia* v. *United States*, 131 S. Ct. 2382, 2384 (2011); see also 18 U.S.C. § 3553(a)(2) (2006) (listing these four purposes as factors to be considered when imposing a sentence); Model Penal Code § 1.02(2) (2001) (listing eight purposes of sentencing); see generally S. David Mitchell, *In With the New, Out With the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 10–11 (2009).

An ameliorative statute "represents a legislative judgment that the lesser penalty . . . is sufficient to meet the legitimate ends of the criminal law." *People* v. *Oliver*, 134 N.E.2d 197, 202 (N.Y. 1956); accord Mitchell, *supra*, at 12–17. No social utility is gained from imposing "sentences that have been acknowledged by Congress as unjust." *United States* v. *Fisher*, 646 F.3d 429, 430 (7th Cir. 2011) (Williams, J., dissenting from a denial of rehearing), *cert. denied*, No. 11-6096, 2011 WL 3812692 (U.S. Nov. 28, 2011); cf. *Dobbert*, 432 U.S. at 294–95. Indeed, this Court has held that § 109, as applied to civil cases, "embodies a principle of fair dealing," *De La Rama S.S. Co.* v. *United States*, 344 U.S. 386, 389 (1953) (evaluating whether § 109 bars extinguishment of certain claims in admiralty), and using it—contrary to its original purpose—to *force* courts to apply an "unjust" sentence would patently violate this principle.

There is an "overriding necessity of a sentence which . . . adequately expresses the community's view of the gravity of the defendant's misconduct." Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 Law & Contemp. Probs. 401, 437 (1958). And the "community's view," of course, is expressed through its elected representatives. See *id.* Congress passed the FSA "[t]o restore *fairness* to Federal cocaine sentencing." Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372 (emphasis added). As one district court put it, "what possible reason could there be to want judges to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010) (emphasis in original), *aff'd*, 644 F.3d 39 (1st Cir. 2011).

C. The Seventh Circuit's rule, if applied broadly, will impose significant social costs, contrary to Congress's intent.

Enforcing a penalty harsher than Congress has deemed just imposes significant social costs, including the cost of incarceration. See Hart, *supra*, at 438 ("Of all the forms of treatment of criminals, prison sentences are the most costly to the community not only because of the out-of-pocket expenses of prison care, but because of the danger that the effect on the defendant's character will be debilitating rather than rehabilitating.").

Refusing to apply the FSA on the basis of § 109 would contravene Congress's clearly ameliorative intent. This Court has squarely held that § 109 "cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." *Great N. Ry. Co.* v. *United States*, 208 U.S. 452, 465 (1908). "[O]ne legislature cannot abridge the powers of a succeeding legislature," *Fletcher* v. *Peck*, 10 U.S. (6 Cranch) 87, 135 (1810), and § 109 simply cannot be construed to allow the 41st Congress to abridge the powers of the 111th.

Congress, after years of debate, decided to alleviate the 100:1 crack-to-cocaine sentencing disparity in light of its growing recognition of mistaken factual assumptions that led to establishment of the 100:1

ratio, as well as the "significant racial disparities that it produced in federal drug sentencing." *Douglas*, 746 F. Supp. 2d at 222; accord *Kimbrough* v. *United States*, 552 U.S. 85, 98 (2007) (noting that the 100:1 ratio "'fosters disrespect for and lack of confidence in the criminal justice system' because . . . the severe sentences required by the 100-to-1 ratio are imposed 'primarily upon black offenders.'" (quoting United States Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy, at iv (May 2002), available at http://www.ussc.gov/_congress/crack/crackrpt.pdf)).

Congress intended the ameliorative changes to apply as soon as possible, and gave the Sentencing Commission "emergency authority" to promulgate new guidelines "as soon as practicable." Fair Sentencing Act of 2010, Pub. L. No. 111-220, § 8, 124 Stat. 2372, 2374. As Judge Williams pointed out, this emergency authority would be pointless—and § 8 of the FSA would be reduced to mere surplusage—if Congress intended the sentencing courts to look to the old, repealed statute for guidance. *Fisher*, 646 F.3d at 432 (Williams, J., dissenting from a denial of rehearing). Refusing to apply the ameliorative statute can "serve no purpose other than to satisfy a desire for vengeance." *Oliver*, 134 N.E.2d at 202.

CONCLUSION

For the foregoing reasons, in addition to those advanced by the petitioners, this Court should reverse the decisions of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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February 1, 2012

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